Restorative Justice — A Conceptual Framework

by Jennifer J. Llewellyn &
Robert Howse

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RESTORATIVE JUSTICE ~ A CONCEPTUAL FRAMEWORK

Prepared for the Law Commission of Canada

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INTRODUCTION

Restorative justice has become a fashionable term both in Canadian and foreign legal and social policy discourse. Restorative justice is certainly not a new idea. In fact, it is foundational to our very ideas about law and conflict resolution. There is, nevertheless, a lack of clarity about the meaning of this term. Often it is used as a catchall phrase to refer to any practice which does not look like the mainstream practice of the administration of justice, particularly in the area of criminal justice. Little attention has been spent attempting to articulate what distinguishes a practice as restorative. Rather, we have been content simply to identify what restorative justice is not – namely two lawyers, a jury and/or judge in a courtroom.

A conceptual framework for restorative justice is required in order to understand what practices meet the demands of a restorative model. This paper is intended to develop just such a conceptual framework for restorative justice. The framework will articulate a definition of restorative justice, examine its relationship to other prevailing conceptions of justice, and identify the constitutive elements necessary for restorative justice practice. Restorative justice is fundamentally concerned with restoring social relationships,[1] with establishing or re-establishing social equality in relationships. That is, relationships in which each person's rights to equal dignity, concern and respect are satisfied. What practices are required to restore the relationship at issue will, then, be context-dependent and judged against this standard of restoration. As it is concerned with social equality, restorative justice inherently demands that one attend to the nature of relationships between individuals, groups and communities. Thus, in order to achieve restoration of relationships, restorative justice must be concerned both with the discrete wrong *and* its relevant context and causes.

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[1] Restoring relationships does not then necessarily mean restoring personal or intimate relationships but rather social relationships of equality. For example, a restorative process dealing with spousal violence would not entail the reconstruction of an intimate relationships between the individuals but would entail their co-existence with security and equal respect within the same community.

It is this dual nature of restorative justice that, in important ways, makes it a more adequate perspective or rubric from which to articulate "alternatives" to traditional processes and approaches to wrongdoing, than many of the other expressions and concepts that are current in these discussions, such as restitutive justice, "healing", mediation, and so forth. The notion of restoration implies the existence of a state of wrong that disrupts the relationship in society between those implicated in the doing and the suffering of a wrong. This captures important moral intuitions in more conventional understandings of *justice* that are simply lost by conceiving the alternatives in language such as mediation or healing, that would make doing justice indistinguishable from a kind of generalized therapy for society (where justice, *droit* properly speaking, simply disappears or is submerged by behaviour, or thought, modification.[2] At the same time, in taking the social dimension seriously, restorative justice captures an idea of transformation, of orientation towards the future. While the beginning point of restorative justice is a state of wrong that has disturbed the relationship between the wrongdoer and the sufferer of wrongdoing, its *endpoint* may be quite different than the *status quo ante*. One need only think of the debate in South Africa about the appropriate response to human rights abuses under apartheid. One position, held by some in the anti-apartheid movement itself, was that the reconstruction of South African society as a whole as a just society in which all races would enjoy political, social and economic rights was the necessary and sufficient response to these human rights abuses in the past. The view that prevailed, however, and which is reflected in the Truth and Reconciliation Commission, was that justice could not really be done without somehow addressing the needs for restoration arising out of particular wrongful acts in the past. Yet the overall objective could hardly be understood as restoring the actual *status quo ante* in the relationship in society of the wrongdoers and the sufferers of wrongdoing, which was in fact radically *un*equal. In sum, the ultimate aim of restorative justice as justice could not be fully accomplished, either by forgetting the discrete wrongs of the past, or by ignoring the task of broader social transformation. Thus, restorative justice begins from the disequilibrium of a relationship in society, but what is ultimately to be restored is not the facticity of the relationship before disruption but an *ideal* of a relationship of equality in society, an ideal that survives at least *qua* ideal when basic rights such as security of the person are respected even within a basically unjust context of social equality. This differentiates restorative justice from certain radical, anti-liberal perspectives that suggest that ideas such as the rule of law and rights are simply meaningless in the context of basic social inequality.

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[2] See Alexandre Kojeve's argument about the necessary inadequacy of behaviourist accounts of *droit* to capture the human phenomenon of *droit*: A. Kojeve, "The Specificity and Autonomy of Droit", trans. B-P. Frost, R.

In addition to offering a guide for the development of future restorative justice initiatives, the framework in this paper will also serve as an evaluative tool for existing practices claiming to be restorative in nature. We will briefly examine the parameters and direction for such evaluations.

This paper will also explore the practicalities of applying the framework. Restorative justice practices have most commonly been employed in the area of criminal justice. An examination of the scope of restorative justice practices will be undertaken with a view to entertaining the possibility for restorative justice in other areas of law. In the process, we will attend to the potential problems and limits in applying this model of justice.

Finally, we will look at the interaction with and integration of restorative justice practices with current legal institutions. How can restorative justice be *done* and who are the appropriate actors and agents of restorative justice practices?

HISTORICAL OVERVIEW

Examining the history of the idea of restorative justice will offer a backdrop for the conceptual framework we develop. A review of restorative justice also helps us to understand

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Howse, D. Goulet, *Interpretation: A Journal of Political Philosophy* (1996).

what factors influenced the move away from restorative justice in favour of other conceptions of justice and why we might want to move back towards this model in our current social context. Further, the ways and means of past restorative practices may hold some instruction for the development of future models.

While we want to attend to the history of restorative conceptions of justice and their associated practices, we do not make any claims to offer the kind of full and comprehensive historical examination the subject requires and deserves. Rather, we will content ourselves with an "overview" of historical sources and developments of restorative justice ideas and practices drawn primarily from existing research.[3]

Justice in History

> …we must remember that many of the problems in the way we do justice today are rooted in our understanding of justice, and that this particular understanding is only one possible way, one paradigm. *Others are possible, others have been lived out, others have actually dominated most of our history. In the long sweep of things, our present paradigm is really quite recent.*[4]

While Albert Eglash is generally credited with coining the term "restorative justice" in his 1977 article "Beyond Restitution: Creative Restitution," the conception of justice to which he referred was not new. Restorative justice is not a "new wave" movement on the fringe of legal practice. Such conceptions of justice have been more or less prominent through most of history. As criminologist John Braithwaite tells us, "[r]estorative justice has been the dominant model of criminal justice throughout most of human history for all the worlds' people."[5] Restorative conceptions of justice claim their roots in both Western and non-Western traditions. Thus, a move towards a restorative model of justice is perhaps best understood as a return to the roots of justice, and not as some new-age "cure-all" for an ailing system.

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[3] Such research is itself incomplete as there is much to be done by way of a serious and comprehensive historical research on the topic. We would be remiss if we did not use this opportunity to highlight the importance of such scholarship to the future development of restorative justice theory and practices and entreat those appropriately skilled to undertake such a task.

[4] Howard Zehr "Retributive Justice, Restorative Justice" *New Perspectives on Crime and Justice – Occasional Papers Series* (Kitchener: Mennonite Central Committee, Canada Victim Offender Ministries 1985) at 12. (emphasis added). (Hereinafter: *Zehr 1*)

[5] John Braithwaite 1997 *Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory.* Review Essay Prepared for University of Toronto Law Course, Restorative Justice: Theory and Practice in Criminal Law and Business Regulation. This article is also available on the World Wide Web, Australian Institute of Criminology Home Page – http://www.aic.gov.au at 3.

Nevertheless, many historical accounts of justice and the administration of justice have served to obscure these restorative roots. Bianchi suggests that scholars, particularly those from the West, are so attached to the punitive model, which forms the backbone of our current justice system, they are unable to contemplate the success of other models in other times and places. [6] According to Bianchi,

> [a]lthough punitive criminal law is a rather late development in Western history and, in its present form, is a construction of recent modern times, many learned scholars in this field believe in the shaky dogma and assume that our present punitive structure of crime control depends on some kind of eternal and natural law, having always existed, though in a cruder form, and having survived because it turned out to be more suitable.[7]

This failure of imagination has lead scholars when faced with evidence of other historical responses to crime, other conceptions of justice, "…to ignore it and seek passionately for vestiges of a punitive model in history."[8] As a result, Bianchi laments, "[t]he fallacies of anachronism play a regrettable role in the historiography of crime control. Professional historians, well aware of the danger of anachronism, have until recently ignored the history of criminal policy and left study of it to jurists, who were often insufficiently trained."[9] Part of this

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[6] Herman Bianchi *Justice as Sanctuary: Toward a System of Crime Control* (Bloomington: Indiana University Press, 1994) at 10. (Hereinafter: *Bianchi*)

[7] *Bianchi* at 9.

[8] *Bianchi* at 10.

[9] *Bianchi* at 9. Bianchi defines anachronism as a problem of historical interpretation. "Anachronism is the tendency to make a false reconstruction of history by attributing our own models of thought, customs, and social structures to a period of history to which they could not have belonged." Among the anachronisms developed in support of our current conception of justice is the use of the idea of criminal law with respect to ancient societies. Bianchi claims that "[t]he mere use of the terms *criminal law* and *crime control* in reference to ancient law and legislation is already an anachronism. After using the modern word *crime* in a historical study of ancient law, we then apply it to a culture which, like all ancient cultures, had no official public prosecutors and not special criminal trials, a culture in which criminal policy was not even a part of public law." In particular Bianchi points to the fact that neither the Romans nor the Greeks had any word meaning crime or punishment.

Perhaps the most widely believed anachronism with respect to concepts of justice is the use of the bible and Hebrew law as justification for retribution. The *lex talion*, of the Old Testament, "an eye for an eye" is repeatedly effort to recreate a history supportive of our current justice system, has lead to the portrayal of premodern justice "…as vengeful and barbaric, in contrast to the more rational and humane approach of modern justice."[10] This picture of history serves advocates of our current retributive system well. Retribution and state control come to be seen as necessary counters to the inevitable alternative of private vengeance and blood feuds. A closer look at the history of justice reveals, however, that other models have predominated throughout most of western history. Zehr describes the challenge brought by such a revelation.

> It is difficult to realize that the paradigm which we consider so natural, so logical, has in fact governed our understanding of crime and justice for only a few centuries. We have not always done it like this. … Instead, community justice has governed understandings throughout most of our history. … For most of our history in the West, non-judicial, non-legal dispute resolution techniques have dominated. People traditionally have been very reluctant to call in the state, even when the state claimed a role. In fact, a great deal of stigma was attached to going to the state and asking it to prosecute. For centuries the state's role in prosecution was quite minimal. Instead it was considered the business of the community to solve its own disputes.[11]

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cited as justification for retribution. As a result many assume that the primary theme of the Old Testament and Hebrew justice generally is retribution. This has served as powerful support for our retributive system. However, there are serious problems with the use of the *lex talion* for these purposes. As Zehr reminds us, this phrase, taken as central to the concept of justice in the Old Testament, actually only appears three or four times. (*Zehr 1* at 10) Perhaps most problematic, however, is not the infrequency with which it appears but the inaccuracy with which it is translated. While Zehr suggests that the translation of an "eye for an eye" as a retributive demand is an oversimplification, Bianchi is much stronger in his censure. "We are here concerned with a gross example of intentional "error" in the translation of a Biblical text." (*Bianchi* at 29.) He explains "[i]n nearly all passages in the Old Testament where English and European translations use such terms as *retribution, retaliation, Vergeltung* (German), and *vergelding* (Dutch), we find in the Hebrew text the root *sh-l-m*, well known as *shalom*, signifying "peace"." In fact, he continues, not only is retribution not intended it is specifically forbidden as the bible commands "Don't retaliate, for mine is the peace, says the Lord." (*Bianchi* at 29.)

"An eye for an eye" was intended as a limit not a call to retribution. German Theologian Martin Buber has translated the passage as "an eye for the compensation of an eye and a tooth for the compensation of a tooth." This suggests, as Zehr does, that the *lex talion* was intended to bring peace through compensation aimed at maintaining the power balance between groups. When the constituent elements of society were families and tribes as was the case in the time of the Old Testament, it was possible to conceive restoration of social equality as entailing the sacrifice of a member of the perpetrator's tribe in compensation for the loss of the victim from her tribe. The focus however, was compensation, re-establishing the balance disturbed by the loss of a member of ones tribe. The idea of *shalom*, restoration and not retribution was central to the concept of justice in the Old Testament. "Restitution and restoration overshadowed punishment as a theme because the goal was restoration to right relationships." (*Zehr 1* at 11.)

[10] Howard Zehr *Changing Lenses: A New Focus for Crime and Justice* (Waterloo: Herald Press, 1990) at 106. (Hereinafter *Zehr 2*)

[11] *Zehr 1* at 6/7.

The period before state centered or so-called public justice is often referred to as a time of private justice. This term, however, may be the source of some misunderstanding. Private justice conjures images of revenge, a private/personal evening of scores, of unregulated, unrestrained, generally violent, response to wrongdoing. This is not a balanced portrayal of the operation of justice before state involvement. Instead "[t]he administration of justice was primarily a mediating and negotiating process rather than a process of applying rules and imposing decisions."[12] Zehr has suggested "community justice" as a more appropriate descriptor for this early period as disputes were connected to and resolved by the community. Community justice "...recognized that harm had been done to people, that the people involved had to be central to a resolution, and that reparation of harm was critical. Community justice placed a high premium on maintaining relationships, on reconciliation."[13] According to Van Ness and Strong the "...goal of the justice process was to make things right by repairing the damage to those parties, whether the damage was physical, financial or relational."[14] Hoebel compares the work of primitive law with that of a doctor. Just as doctors were charged with keeping the human body in healthy balance, law was to keep the social body in good health by "bring[ing] the relations of the disputants back into balance."[15]

This is not to suggest that no other responses to conflict existed during this time. Although, retribution and formal judicial resolution were both exercised, these were mechanisms of last resort.[16] They were options only when community justice failed, where negotiation was not forthcoming or possible. Resort to retribution or forced resolution was met with regret as an unfortunate necessity in exceptional cases, not the norm as we have come to believe. Zehr maintains that while retribution existed it was "...a means as much as an end in itself." Moreover, he explains "...the meaning and function of retribution often reflected a compensatory vision. The system rested first on the necessity of compensating victims and repairing relationships."[17]

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[12] *Zehr 2* at 100.

[13] *Zehr 2* at 107.

[14] Daniel Van Ness and Karen Heetderks Strong *Restoring Justice* (Cincinnati: Anderson Publishing Co., 1997) at 6 (Hereinafter *Strong*).

[15] E. Adamson Hoebel *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (New York: Atheneum, 1973) at 279.

[16] Zehr notes that even when these options were used they were limited. Vengeance was tempered through the existence of sanctuaries where individuals accused of wrongdoing could seek shelter and protection from retribution. (See generally: Bianchi *Justice as Sanctuary: Toward a System of Crime Control*) Courts too were limited in their powers. They were not able to initiate or continue prosecution without a victim pressing the accusation. The courts actually operated within the context of community justice, fulfilling a referee-like function aimed at balancing the power between the two parties so that they might come to some agreement.

Bianchi admits that while there have been many theories attempting to explain the origin of our retributive system, none have succeeded in offering a "plausible and satifying theory of its origin."[18] There does seem to be agreement that the move from community justice to what we know today as public, state centered, retributive justice began as early as the eleventh and twelfth centuries. For centuries to follow, however, "...the old systems of conflict resolution, repair, and dispute settlement survived, openly or covertly, in many countries."[19] It would take until the nineteenth century for this new model of justice to gain prominence.[20] Whatever other factors may have prompted this change, it is clear, at least in part, that it was motivated by the desire for political power both in the secular and religious spheres.[21] Legal Historian Harold Berman argues that this change amounted to a "legal revolution."[22] This revolution resulted in a reconceptualization of the nature of disputes. By its end the crown had proclaimed itself "keeper of the peace" and as such would be the victim whenever the peace was violated. The role of the courts changed in suit; no longer was their task to referee between disputing parties requesting their involvement. Courts now took up the role of defending the crown. They began to play an active role in prosecution, taking ownership over those cases in which the crown was deemed victim.[23] Justice as the work of these courts came to mean "applying rules, establishing guilt, and fixing penalties."[24] This new role of the crown resulted in devastating and lasting effects for the real victims harmed by wrongful acts. They were no longer parties in their own cause, their disputes having been effectively stolen from them. This remains the situation today as victims have little or no power with respect to their case. They can not initiate or stop or settle a prosecution without the permission of the state, and can often be locked out of the process altogether if they are not useful as a witness in the case. Evidence of this change in focus from victim-centered to state-centered justice can be found in the preference for fines (payable to the crown) instead of restitution and for punishment over settlement, and indeed more recently by the possibility of award of punitive damages in some not conventionally "criminal", or even legislated entitlement to them. Punishment served the interests of the state serving as a show of power and authority while doing nothing to address the harm caused by the wrongdoing. Crime was about law breaking not harm. As a result, attention was focused on the actions of the offender not the effects of her behaviour.[25]

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[17] *Zehr 2* at 104.

[18] *Bianchi* at 15.

[19] *Bianchi* at 16.

[20] *Zehr 2* at 107.

[21] *Zehr 2* at 110. Van Ness argues that "countries which trace their legal heritage to England can point to the reign of William the Conqueror as the turning point from restitution-centered justice to state-centered justice. William and his descendants used the legal process to increase their political power, competing with the growing influence of the church over secular matters under canon law, and with local systems of dispute resolution controlled by the barons." Daniel Van Ness "Restorative Justice" Burt Galaway and Joe Hudson eds., *Criminal Justice, Restitution, and Reconciliation* (Monsey, New York: Criminal Justice Press, 1990) at 7/8. (Hereinafter: *Van Ness 1*)

[22] See generally: Harold J. Berman *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983).

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[23] *Zehr 2* at 110.

[24] *Zehr 2* at 112.

[25] Van Ness and Strong offer a helpful chart distinguishing the ancient approach to crime from our current approach. *Strong* at 7.

	Ancient Pattern	**Current Pattern**
Crime	Injury to victims and their families in the context of the community	Violation of the law
Parties	Victims, offenders, community and government	Offenders and government
Goal	Repair damage and reestablish right relationships	Reduce future lawbreaking through rehabilitation, punishment, deterrence and/or incapacitation.

Contemporary Restorative Ideas[26]

Restorative conceptions of justice are not limited to ancient times, rather they can be found in the lasting traditions of many non-Western societies. Our efforts to examine the development and role of restorative approaches to justice warrant a brief look at some of these existing examples.

Van Ness and Strong note that many pre-colonial African societies "…aimed less at punishing criminal offenders than at resolving the consequences to their victims. Sanctions were compensatory rather than punitive, intended to restore victims to their previous position."[27] One of the main functions of precolonial law, as Mqeke describes it, was "…the restoration of the disturbed social equilibrium within the community."[28] The African concept of *ubuntu* is the philosophy of personhood underlying the traditional conception of justice. Providing a precise definition of *ubuntu* is difficult. It denotes a sense of humanity, of the natural connectedness of people. Villa-Vicencio explains "…a traditional African understanding of *ubuntu* affirms an organic wholeness of humanity – a wholeness realized in and through other people. The notion is enshrined in the Xhosa proverb: *umuntu ngumuntu ngabantu* (a person is a person through persons)."[29] *Ubuntu* is commonly described through the saying "I am because you are" or "my humanity is tied up with your humanity". The effect such a conception of humans must have on one's understanding of justice is clear. If one's humanity is tied up with the humanity of all others what makes others worse off also brings harm to oneself. Thus, responses to wrongdoing must aim to repair the damage, to make the wrongdoing better off for it is only in doing so that one can address the harm the victim(s) suffered. In other words, restoration requires attention to each part that suffers, for restoration is impossible if a part of the whole is harmed. While colonialization has replaced much of African customary law with a Western retributively oriented system, there has of late been a move to return to the restorative approaches embodied in traditional practices.

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[26] In the discussion of the literature that follows, the language of victim and perpetrator or offender is often adopted in signaling two categories of persons who are to be restored. This language is misleading in a number of respects in light of the approach to restorative justice articulated in this paper. First of all, it implies that restorative justice is limited to the criminal context. Secondly, in adopting the bipolar image of more conventional theories of justice, it hides the potential of the restorative approach in dealing with situations where simple notions of agency do not easily capture the complex involvement in a wrong a variety of individuals and collectivities (for example inter-generational responsibility, the liability of corporations or other collective entities, etc.) We have tried not to prejudge these issues by using wrongdoer and sufferer of wrong in our own expressions of the categories, but even this is an oversimplification. For example, in a corporation where systemic discrimination has occurred against minorities, restoration of the "victims" may also require restoration of others who neither could claim to be discriminated against themselves nor were directly involved in discrete wrongful acts of discrimination. By virtue of being implicated in an unjust "system" they will have restorative needs (perhaps for therapy, education, dialogue) but classifying them either as "victims" or "offenders", "wrongdoers" or "sufferers of wrondoing " is misleading. This issue is explicitly addressed below at p.43, when we discuss "who" is to be restored.

[27] *Strong* at 9.

[28] R. B. Mqeke "Customary Law and Human Rights" *The South African Law Journal* 1995:364 at 365.

[29] Charles Villa-Vicencio "Identity, Culture, and Belonging: Religious and Cultural Rights" John Witte, Jr. and Johan D. van der Vyver eds., *Religious Human Rights in Global Perspectives: Religious Perspectives* The Hague: Martinus Nijhoff Publishers, 1996) at 527. Also see: Gabriel Setiloane *African Theology: An Introduction*

Another contemporary example of restorative approaches to justice is that found in the Japanese experience.[30] The Japanese have a formal process that is for all intents and purposes a Western system. This system is heavily influenced by the German system and includes American-style constitutional protections. However, along side the formal process is a second track for which there is no Western counterpart.

> A pattern of confession, repentance, and absolution dominates each stage of law enforcement in Japan. ...From the initial police interrogation to the final judicial hearing on sentencing, the vast majority of those accused of criminal offences confess, display repentance, negotiate for their victims' pardon and submit to the mercy of the authorities. In return they are treated with extraordinary leniency; they gain at least the prospect of absolution by being dropped from the formal process altogether.[31]

As Haley explains, a number of factors are considered in deciding how a given wrongdoer should be dealt with. Many of these considerations are similar to those in the Western system (i.e.: nature, gravity, and circumstances of the wrong, and details about the wrongdoer including prior wrongful conduct, age, and mental capacity).

(Johannesburg: Skotaville Publishers, 1996); Valiant A. Clapper "Ubuntu and the Public Official" *Publico* December 1996 at 27; Lionel Abrahams, "Ubuntu or not to?" *Sidelines* June 1997 at 1.

[30] See generally: John O. Haley "Confession, Repentance and Absolution" in Martin Wright and Burt Galaway eds. *Mediation in Criminal Justice* (London: Sage Publications 1989) 195 (Hereinafter: Haley); Daniel H. Foote "The Benevolent Paternalism of Japanese Criminal Justice" Cal. L. Rev. 80 (1992): 317; Strong at 60.

> Added to this matrix in Japan, however, are additional factors that appear to be missing elsewhere – at least in the West. Not only the attitude of the offender in acknowledging guilt, expressing remorse, and compensating any victim but also the victims' response in expressing willingness to pardon are determinative elements in the decision whether to report, to prosecute and to sentence the offender.[32]

The aim of this two track system is transformation not retribution. While the Japanese example seems to privilege the more formal retributive system by treating the restorative element as more of an add-on intended to affect the outcome in court, there are nevertheless lessons to be taken from this experiment. It is worth noting that Japan's crime rate has decreased steadily in the period since World War Two. While many explanations have been offered for this trend, the inclusion of a restorative approach is frequently overlooked. Haley concludes that "[t]here is, however, evidence to justify the hypothesis that the Japanese pattern – acknowledgement of guilt, expression of remorse including direct negotiation with the victim for restitution and pardon as preconditions for lenient treatment, and sparing resort to long-term imprisonment – does contribute to a reduction in crime."[33]

Finally, restorative ideas can be found within the Canadian context in aboriginal understanding of and approaches to justice.[34] Aboriginal peoples in various parts of the world practice and advocate restorative approaches to justice.[35] Ross speaks of an ancient conviction that

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[31] *Haley* at 195.

[32] *Haley* at 199.

[33] *Haley* at 209.

[34] "The Native Indians and Inuit of Canada's Northwest Territories have traditionally enjoyed justice systems based upon the restoration of order and reparation to the injured party. These types of traditional justice have been ignored by the Anglo-Canadian criminal justice system…" Curt Taylor Griffiths and Allan L. Patenaude "The Use of Community Service Orders and Restitution in the Canadian North: The Prospects and Problems of 'Localized' Corrections" Burt Galaway and Joe Hudson eds., *Criminal Justice, Restitution, and Reconciliation* (Monsey, New York: Criminal Justice Press, 1990) at 145.

[35] Rupert Ross in his book detailing his experience with aboriginal approaches to justice cites the examples of sentencing circles in Canada's North, Family Group Conferencing in New Zealand and The Navajo peacemaking processes in the United States as just a sample of the kinds of restorative initiatives developing in and out of aboriginal understandings of justice. Rupert Ross *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books, 1996) chapter one. (Hereinafter: *Ross*)

> …the best way to respond to the ups and downs of life, whether defined as "criminal" or not, is not by punishing solitary offenders. The focus must be shifted instead towards the teaching and healing of all the parties involved, with an eye on the past to understand how things have come to be, and an eye on the future to design measures that show the greatest promise of making it healthier for all concerned.[36]

This conception is sometimes called sacred justice. As Diane LeResche describes it, "Sacred justice is that way of handling disagreements that helps mend relationships and provides solutions. It deals with the underlying causes of the disagreement… *[S]acred justice is found when the importance of restoring understanding and balance to relationships has been acknowledged.*"[37]

Origins of Restorative Justice

Restorative justice theory owes much to recent movements aimed at addressing the failures of the existing justice system and developing new ways of "doing justice." As will become clear from the conceptual framework we develop, these movements, while they incorporate restorative elements, are not in and of themselves examples of restorative justice. Van Ness and Strong argue that "[n]one of these movements alone has lead to restorative justice theory, but all have influenced its development, if only because many who are now preoccupied with restorative justice came to it from one of [these] perspectives."[38] Restorative justice theory, including our own contribution, draws much from the wisdom gained from these experiments and experiences. Thus we feel it important to identify those movements which have had the greatest influence.[39] Van Ness and Strong identify five such movements:

1) The **informal justice movement** emphasized informal procedures with a view to increasing access to and participation in the legal process. They focused on delegalization in an effort to minimize the stigmatization and coercion resulting from existing practices.[40]

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[36] *Ross* at 15.

[37] As quoted in *Ross* at 27.

[38] *Strong* at 24.

[39] We are indebted to the work of Van Ness and Strong in this area. See *Strong* at 16.

[40] See generally: Jerold Auerbach *Justice without Law?* (New York: Oxford University Press, 1983); Nils Christie "Conflicts as Property" Burt Galaway and Joe Hudson eds., *Perspectives on Crime Victims* (Toronto: The C.V.

2) **Restitution as a response to crime** was rediscovered in the 1960's. The movement focused on the needs of victims, maintaining that meeting the needs of victims would serve the interests of society more generally.[41]

3) The **victim's rights movement** works to have the right of victims to participate in the legal process recognized.[42]

4) **Reconciliation/conferencing movement** – Van Ness and Strong cite two major strands in this movement:
a. *victim/offender mediation* – Originating from efforts of the Mennonite Central Committee, this process brings victim and offender together with a mediator to discuss crime in order to form a plan to address the situation.[43]
b. *Family group conferencing movement* in New Zealand – arising out of the Maori traditions in New Zealand.[44]

1) The **social justice movement** – Van Ness and Strong use this label to refer generally to a number of different groups working for a vision of justice as concerned inherently with social well being.

A THEORY OF RESTORATIVE JUSTICE

In this section we will address the central concern of the paper, namely, what restorative justice is and how it relates to other conceptions of justice. A conception of justice as restorative is best understood relative to our current conceptions of justice. Comparisons allow one to see what restorative justice shares with other conceptions and how it differs. They reveal the extent to which other conceptions of justice are driven by many of the same goals/aspirations as restorative justice and illuminate how a restorative justice model better achieves such goals. We

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Mosby Company, 1981); Roger Matthews, "Reassessing Informal Justice" in Roger Matthews ed., *Informal Justice?* (Newbury Park, C.A.: Sase Publications 1988).

[41] See generally: Stephen Schafer *Compensation and Restitution to Victims of Crime* (Montclair, NJ: Patterson Smith, 1970); Stephen Schafer "The Restitutive Concept of Punishment" Joe Hudson and Burt Galaway eds., *Considering the Victim* (Illinois: Charles C Thomas, 1975); Randy E. Barnett and John Hagel, eds., *Assessing the Criminal: Restitution, Retribution, and the Legal Process* (Cambridge, MA: Ballinger Publishing Co., 1977).

[42] See Generally: F. Carrington and G. Nicholson "The victims' movement: An idea whose time has come" *Pepperdine Law Review* 11 (23), 1984 at 1.

[43] See generally: Robert Coates "Victim-Offender Reconciliation Programs in North America: An Assessment" Burt Galaway and Joe Hudson eds., *Criminal Justice, Restitution, and Reconciliation* (Monsey, New York: Criminal Justice Press, 1990); Dean Peachey "The Kitchener Experiment" Martin Wright and Burt Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Newbury Park: Sage Publications, 1989). (Hereinafter: *Peachey*)

[44] See generally: Christine Alder and Joy Wundersitz, eds., *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Canberra: Australian Institute of Criminology, 1994).

will examine restorative justice relative to the three major contemporary theories of justice: justice as restitution, corrective justice and a conception of justice as retributive.

Out of this analysis we develop a conception of restorative justice as concerned with the restoration of relationships. Restorative justice is fundamentally concerned with restoring social relationships, with establishing or re-establishing social equality in relationships – that is, relationships in which each person's rights to equal dignity, concern and respect are satisfied. As it is concerned with social equality, restorative justice inherently demands one attend to the nature of relationships between individuals, groups and communities. Thus, in order to achieve restoration of relationships restorative justice must be concerned both with the discrete wrong *and* its relevant context and causes. What practices are required to restore the relationship at issue will, then, be context-dependent and judged against this standard of restoration.

Before we begin the task at hand – that of developing a conceptual framework for restorative justice - a note regarding the nature of the current work in this area is necessary. As we will see, most of the descriptions and/or definitions of restorative justice explain restorative justice in terms of what it is not. Thus, much of this work addresses the area of criminal law as it stands in starkest contrast with a restorative conception of justice. Through our examination and comparison with retributive justice later in the paper, we will make clear the reasons for this contrast. What is important to note at this stage is that this contrast has resulted in the limiting of restorative justice discussions to the criminal justice arena. This limitation is unnecessary, however, when we recognize its rootedness in the arbitrary historical distinction between public and private law. As we saw earlier, this distinction was the result of monarchies' attempts to gain power and financial rewards. The decision as to which conflicts and harms were to be deemed public and those which remained private had little to do with inherent differences in the nature of the acts. Instead, the distinction was grounded on morally arbitrary choices about which actions could threaten the rulers' social position or control. Thus, the distinction between what is a crime and what is not was, and remains today, the will of those with the power to define crime with an eye to social control. The arbitrariness of this distinction is apparent when one understands acts in terms of their resulting harm instead of according to their classification as criminal or not.[45] The main concern from this perspective is the identification of the individual who committed the wrong or abuse and the individual(s) harmed. This focus results in the reinstatement of the sufferer of harm as central and removes the state as a primary actor.

Restorative justice as *justice*, is, however, necessarily concerned with addressing *wrongs*. Thus, although the scope of restorative justice will extend far beyond the scope of those wrongs defined as criminal at a given time or place, it is not a general answer to the problem of human conflict resolution. For instance, in the family context, where the parties are trying to mediate, after a marital breakdown, the interpretation of a pre-nuptial agreement, and neither party is making claims of wrongdoing against the other, this is not a task for restorative justice. On the other hand, where what is involved is dealing with past domestic violence, restorative processes would very much need to be put into play. In commercial settings, there are many disagreements between agents about future courses of action within an industry or and enterprise that might usefully be referred to arbitration or mediation as a means of conflict resolution but, again, unless there is a connection with a wrong, this is not the business of restorative justice.

At the same time, there is important scope for social dialogue and debate about when wrongs or wrongfulness are at issue and where they are not. It might be plausible to view consumer bankruptcy in most cases as an institution for rational risk-management by both creditors and debtors; from one perspective, when a consumer debtor cannot pay its obligations a right of the creditor has been violated and therefore a wrong has occurred, but from another point of view, all that has happened is the materialization of a risk that has been priced in the original contract, in part in light of the institution of bankruptcy. Of course, the latter kind of "law and economics" interpretation could be applied (and has been applied) to everything, including murder and sexual assault, to make the category of justice disappear. But a society has to work out in moral and political argument the boundaries of wrongfulness. The idea of restorative justice does not fix these with precision, *a priori* as it were.

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[45] Martin Wright agrees as he argues that "[t]he boundary between crime and other harmful actions is an artificial and constantly changing one. Crimes are not necessarily different in kind from other actions by which people harm each other. If a neighbour claims a strip of land by moving the fence, the conflict is treated as a civil one; if a thief lays claim to a car, it is defined as a crime, but is still essentially a conflict over ownership. The theft is usually committed by a person who is a stranger to the victim; there is no inherent reason for dealing with the two incidents in different ways, and indeed crimes do also constitute civil wrongs." Martin Wright *Justice for Victims and Offenders* (Philadelphia: Open University Press, 1991) (Hereinafter *Wright I*).

This means that one must not jump to restorative justice as an answer where there is a strong intuition that the processes and rules of conventional justice somehow do not seem appropriate to the management of a particular social problem. The reason may be that it is inappropriate, in the context, to view the problem as one of *justice*. At the same time, we see that we can have elements of fault and responsibility built into a process that is not a conventional one (the process of restorative justice) - this is important in itself, because often the price to be paid for moving beyond the courts as it were was having to conceive the matter as a "no-fault" situation. In sum, when we are looking to move beyond the conventional justice system in some way, whether in commercial areas or the family to use two already cited examples, we should be clear on the source of concern - i.e. whether it is because we are trying to solve problems that we no longer think are really about justice, or whether we need to aim at a different conception of justice.

We will return to a fuller discussion of the scope of restorative justice practices. For now it is important to re-emphasize that we do not intend in our discussion of restorative justice to limit the meaning of offender/perpetrator or victim to the criminal context. Rather, we mean offender/perpetrator as the individual who committed the wrong (that harm which requires address) and victim as that individual suffering the harm.

A Question of Justice

Before we attempt to offer any description or definition of restorative justice let us take a moment to consider the nature of our project. As we noted in the introduction, the label restorative justice is often attached to any practice that takes place outside a courtroom without two lawyers and a judge. It is little wonder given the prevailing acceptance of restorative justice as a catch-all phrase for alternative practice that it has offered little to the cause of reforming the justice system.

The current use of the term has robbed restorative justice of its potential to bring fundamental change to our current justice system. It leaves unconsidered restorative justice as *justice*. As a conception of justice, restorative justice challenges the very idea of justice prevalent in the current justice system. It is this challenge that holds the promise for effective reform. As Zehr explains, ignorance that such a challenge is required has resulted in the failure of all of the recent attempts at reform. According to Zehr, 'tinkering' with the current model will not work and reforms will continue to be unsuccessful until they question the fundamentals of the current system. Speaking with regard to the criminal justice system he comments:

> It seems to me that the reasons [for why the current system does not work] are fundamental, that they have to do with our very definitions of crime and justice. Consequently, the situation cannot be changed by simply providing compensation to victims, by providing the possibility of alternative sanctions for offenders, or by other sorts of "tinkering." We have to go to the root understandings and assumptions.[46]

Going to the root understandings and assumptions means examining the conception of justice underlying our existing systems. It means asking 'the justice question': What is the nature of justice? What does justice demand?

Justice is a response to a powerful moral intuition that 'something must be done,' that something (someone) has disturbed the way things ought to be and something must be done to right the wrong, to make things right. In fact, this sentiment is often expressed as the imperative:

"justice *must* be done." As we will see, our current system of justice makes assumptions about what the something is that must be done. Taken seriously however, restorative justice forces us to revisit this question and ask exactly what it is that we think ought to be done in response to wrongdoing. Restorative justice, properly understood then, means much more than a "tinkering" with current practices. Restorative justice is a different conception of justice and as such requires us to reexamine our very assumptions about justice.[47]

Thus, our project is to offer a conception of restorative justice as *justice*. It is this conception that ought to be used to guide the development of new restorative practices and to evaluate those currently laying claim to this label.

Defining Restorative Justice

Tony Marshall offers a workable *description* of restorative justice in practice:

> Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.[48]

This description is very open. Its lack of specificity leaves several questions open – who is to be restored? To what are they to be restored? While Marshall is offering us a "one size fits all," or general description, and not a theory of restorative justice, the open nature of his description holds important clues for the nature of a restorative justice theory. Restorative justice does not force situations to fit theory. Rather, as a theory, it is open and flexible enough to apply on a variety of levels and to different contextual imperatives. John Braithwaite recognizes this in his own response to the questions restore who? to what? In answer to the 'who' question he says, "…restorative justice is about restoring victims, restoring offenders and restoring communities." To the 'what?' inquiry, he suggests "…whatever dimensions of restoration matter to the victims,

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[46] *Zehr I* at 3.

[47] Zehr has compared the change required to that of a paradigm shift.

[48] As quoted in *Braithwaite* at 5.

offenders and communities affected by the crime."[49] His response makes clear the way in which restorative justice is sensitive to context and thus appropriate to a variety of situations. A restorative approach is also not limited to an individual level but can be applied with respect to groups and at the institutional level. While Braithwaite does highlight these important features of restorative justice, in the process he falls prey to the common tendency of presenting restorative practices simply as an alternative to retributive justice. In doing so, he risks losing sight of the unifying concept that explains and legitimates this alternative as *justice*, thus failing to offer an actual *theory* of restorative justice.

Daniel Van Ness moves beyond *description* of practice to identify some of the defining elements of restorative justice. He notes certain common elements in the small but growing body of literature on restorative justice. Namely, "a definition of crime as injury to victims and the community peace, a focus on addressing the personal-relational injuries experienced by all parties as well as the financial and legal obligations of offenders, and a commitment to including all parties in the response to the crime."[50] These common elements of restorative justice practices offer some insight into the conception of justice behind such practices. However, Van Ness's explanation still remains more descriptive than definitional. While it will be important to return to an examination of the constituent elements of restorative justice practice, with a view to evaluating existing practices or developing new ones, such an examination depends upon the existence of a conceptual framework. Description of restorative justice practice, thus, must be grounded in a theory of restorative justice.

Restorative Justice ~ A Theory of Justice

While one is wise to resist the urge to define restorative justice as alternative *practice*, definition by comparison might still prove a fruitful strategy in our bid to develop a conceptual framework for restorative justice. In order to understand justice conceived of as restoration it is important to comprehend how this conception differs from other contemporary theories of justice. In fact, such a comparison is perhaps the best starting point in attempting to offer a theory of restorative justice.

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[49] *Braithwaite* at 5.
[50] *Van Ness 1* at 10.

Three main theories of justice comprise most of the contemporary terrain: justice as restitution, corrective justice and retributive justice. Restorative justice shares elements in common with each of these theories. It matches these theories in their positive aspects, and manages to answer their various deficiencies.

Restitution

If asked for an explanation of restorative justice most people will respond that it involves alternative mechanisms for dealing with offenders, which focus on repairing the damage they have done. It is not surprising given this impression of restorative justice that it is often identified with restitution. In fact, most of the American literature uses these terms interchangeably. In part, this is simply because restitution programs have emerged as alternatives or supplements to conventional forms of punishment. And as noted earlier, there is a tendency to lump together as restorative almost all the alternatives to traditional penal strategies. The *linking* of restitution and restorative justice is however, not erroneous as restitution is often an important part of restorative justice practices. One ought not to make the move, however, from this connection to identification of the two understandings of justice for there are important and unmistakable differences between these conceptions of justice. In fact, restitution can serve any number of criminal law purposes, most of which are not restorative. First of all, it can be retributive or punitive in the conventional sense – hard labour in prison, or menial community service, to "pay-back" society for the crime. Secondly, it can be understood as a deterrent, ensuring that "crime doesn't pay." In this sense, restitution is no different than seizing boats and cars that have been purchased with "criminal" money, or the idea that criminals should not be able to profit by writing bestsellers about their criminal exploits. This goes beyond the criminal context, as well, to demands that bankruptcy law be reformed so that the bankrupt does not go "scott-free", perhaps undertaking some kind of future commitment to restore property or money to a creditor who has been forced to accept a part settlement. Thirdly, restitution can be seen as rehabilitative of the perpetrator as an individual, teaching a sense of responsibility (again, as the bankruptcy example illustrates, this may go well beyond the criminal context). In none of these senses, however, does restitution satisfy the demands of justice conceived of as restorative in nature.

Restitution as a common law concept roughly denotes the idea that a gain or benefit wrongly taken or enjoyed should be returned. Justice as restitution holds that the satisfaction of justice requires the wrongdoer to repay or return what she[51] has taken from the sufferer of wrong, the idea being that through her actions the wrongdoer has been enriched at the expense of the sufferer of wrong. By disgorging herself of the benefit of her actions and returning that which was taken from the sufferer, the wrongdoer 'rights' the wrong she created. Restitution then interprets our moral intuition that "something must be done" as demanding that things be returned to the way they were before the wrong occurred. The wrongdoer must return that *thing* which she has taken from the sufferer of wrong.

The strength of restitution is that it is more focused on the sufferer of the wrong than say retribution. Through its focus on returning that which was lost to the sufferer of wrong, restitution places the actual sufferer at the center of any attempt to do justice. According to Van Ness, "[r]estitution has its roots in justice systems which viewed crime as an injury more to the victim than to the government."[52] Restorative justice shares this focus on the actual harm done by the wrongdoer's act and on the person who suffers this harm. In other words, restorative justice and restitution are both outcome focused, directing their attention to the results of an action and not some inherent nature of the action itself. However, restorative justice does not limit its focus to victims. Restorative justice expands its focus to include the perpetrator and the community in attempting to respond to the harm done to the victim. This expanded focus is a product of the difference between restorative justice and restitution with regard to their understanding of the harm resulting from wrongdoing and in what is required to address the situation. What justice requires on this account is a material transfer between perpetrator and victim. Van Ness cites the Anglo-Saxon ruler Ethelbert as an example of this idea.[53] He developed elaborate schedules of restitution according to the specific harm done. For example, loss of a finger was worth so much while the loss of a nail was worth less and the loss of a foot worth much more. This example reveals the primary difficulty for this conception of justice. It assumes without any question that everything is quantifiable.

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[51] We have chosen to use the female pronoun consistently for the sake of grammatical convenience.

The first problem with this is the assumption that it is possible to assign a set value for particular losses. It assigns an objective value for the loss of a hand and the loss of a foot that is deemed appropriate in all cases. The arbitrariness of this value assessment becomes clear when one compares what the loss of a hand would mean to a painter or a surgeon as compared with a speed skater or long distance runner. Set values are necessarily arbitrary because they cannot reflect the relative value of a loss for the individual affected. Even if it were possible to devise a system to account for the various permutations and combinations of people's lives and arrive at an appropriate value for the material loss a victim experiences, the notion of quantification, as it is applied, still suffers problems. Because restitution requires quantification and valuation of that which must be transferred between perpetrator and victim it cannot account for the non-material harms a victim can and often does suffer. In fact, it is the exception not the rule when the

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[52] *Van Ness 1* at 7. Also see: *Strong* at 56 fn: 33. The authors note the striking similarity between the U.K. guidelines for restitution developed several years ago and King Ethelbert's schedules for restitution developed 1,400 years

primary loss a victim suffers is material in nature. Restitution then ignores the very real harm victims experience – a harm to their sense of security resulting from a breach in the social relationship between victim and perpetrator as members of society. Examples of this type of harm are easy to find. Take a case where your bike is stolen and the person who took it is caught. She can, according to this theory, make restitution by returning your bike. This does indeed make up for the material loss you suffered from the theft of your bike – you lost a bike, you got a bike in return. What it does not return however, is the feeling of security you had when you locked your bike up before the theft. It cannot return the feeling that you are safe from being a victim. Further, the simple act of returning the bike fails to offer even security in the knowledge that the same individual will not take your bike again, as it does not involve any consideration by the offender of the wrong and its effects.

In essence the problem here is not the notion of restitution *per se*, rather it is restitution as the ultimate aim of justice. Restitution in and of itself is not enough to address the harm a victim experiences after a wrong has been committed. Justice as restitution amounts to a "bean counting view of justice" where all justice requires is that the scales are balanced by ensuring that each side has the beans they started with. Justice conceived of in this way is backward looking in that it is oriented towards the *status quo ante*. Restitution wants to return things to the way they were before the wrong. In contrast, restorative justice does not take restoration of the *status quo ante* as its goal. The language of restoration has lead some people to misunderstand the ambitions of restorative justice. The word *restore* in common usage suggests a return to the way something was ie: when one restores a historical building the aim is to re-create the previous condition of the building. This understanding of restore has prompted some to argue that restorative justice is better called by some other name like transformative, relational or

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earlier.

[53] *Van Ness I* at 7.

community restorative justice.[54] Others have reacted to it by pigeonholing restorative justice as appropriate only to situations where there has been an identifiable/specific act causing the harm. Restorative justice on this understanding could not address situations we traditionally identify as issues of distributive justice. Thus, it would follow, according to this view, that restorative justice would be but one *kind* of justice appropriate only in certain circumstances rather than a theory of the general nature of justice. This is a misconception of restorative justice. Restorative justice, contrary to restitution, is not a slave to rectifying a wrong by restoring the *status quo ante*. Instead, restorative justice aims at restoration to an ideal. Restorative justice seeks to restore the relationships between the parties involved to an ideal state of social equality. It stands juxtaposed to the backward focus of restitution as it is attempts to address a wrong by transforming the relationship between those involved such that the same situation could not arise again.

Conscripting restitution as a *tool* of restorative justice addresses the problems restitution experiences when taken as an end in itself. As a part of a restorative process, restitution is no longer backward looking but rather an important and often necessary step towards establishing a better relationship between the parties in the future. Also, owing to the fact that it is part of a larger process, restitution need not concern itself with non-material and unquantifiable harms for these can be addressed through other means. In addition, as part of a restorative process, restitution can avoid the charge of arbitrary valuation of harm, as value would be determined through a process of negotiation between the parties involved. Thus, the subjective worth of a hand to a painter could be accounted for as the painter herself tells or interprets the impact of the harm.

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[54] For example see Ruth Morris, *A Practical Path to Transformative Justice* (Toronto: Rittenhouse, 1994); Jonathan Burnside and Nicola Baker, eds., *Relational Justice: Repairing the Breach* (Winchester, UK: Waterside Press, 1994); Marlene A. Young, *Restorative Community Justice: A Call to Action* (Washington, DC: National Organization for Victim Assistance, 1995).

Thus while there are many examples (some of which were addressed above) where restitution is not restorative in any sense, there are also circumstances where a transfer of wrongfully gotten or used gains from perpetrators to victim can serve the purposes of restorative justice – the restoration of an ideal of equality in society so that both victim and perpetrator can now relate to one another as free and equal citizens of that society. A very important instance is where the taking of property has itself, although only part of the wrong, tangibly worsened the social (including economic) inequality between victim and perpetrator. Contemporary examples include the need to address the taking of lands during Apartheid in South Africa through the Land Claims Commission, or the return of aboriginal lands in Canada. It is important to stress again at this point that because justice requires restoration and not restitution (as the ideal of justice in and of itself) much more may need to happen to effect restoration than simply the return of property. Thus, in the South African case the land commission alone cannot effect restoration. Rather, this commission must work along side several other initiatives to navigate the road to restoration. Notably, the return of lands can do little to address the human rights abuses perpetrated in the name of Apartheid. The Truth and Reconciliation Commission has been mandated with the task of discovering the truth about these past abuses as another step on the road to reconciliation. We know all too well that in the case of Aboriginal land claims in Canada, the return of land cannot affect restoration. Simply returning the land will do little to address the absolute destruction of culture and massive abuses of human rights experienced by aboriginal peoples throughout history.

While it is certainly possible for restitution to play an important role in achieving restoration, this is not always the case. On the other end of the spectrum, there are cases where restitution may actually impede the goal of restoration. This relates, in part, to the recognition in restorative justice theory that, although a disturbance of the *status quo ante* can trigger distinctive needs for restoration, since what is to be restored is an ideal of equality in society as between victim and perpetrator, a mere return may not accomplish this goal, or could even worsen it. Take the example of the wrongdoer who is very poor, who steals for economic reasons to support family or drug addiction. Placing a burden of repayment on her may actually frustrate the achievement of an ideal relation of equality that restorative justice seeks, making it more difficult for her to achieve a new socio-economic status that allows a relationship of equal dignity, concern and respect.

Understanding restitution as a part of a larger restorative conception of justice is not new. When one looks at the history of restitutionary practices one wonders if the identification of restitution with justice was based on a misappropriation or misinterpretation of ancient practices. Ancient cultures, Van Ness points out, "sought reparation of victims not only to insure that they received restitution, but also as part of a process of healing – of restoring community peace." Community peace is described in Hebrew Law as *Shalom*. According to Van Ness "*Shalom* meant completeness, fulfillment, wholeness – the existence of right relationship between individuals, the community and God. *Shalom* was the ideal state in which the community should function."[55] Wrongdoing, on this understanding, destroys right relationship and justice aims to restore right relationship. The role of restitution in this system is evident from the very fact that the word used to denote it, *shillum* was derived from the same root as *Shalom*.[56] But, Van Ness reminds, "…restitution was not the ultimate aim. The justice process assumed a relationship between the parties affected by crime, and required a commitment not only to see wrongs addressed, but also to reconcile the parties and restore community peace. Restored *shalom* was the result of doing justice."[57] Restorative justice then might include restitution as a step on the road to its ultimate goal of restoration but restitution can not be the end of the road.[58]

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[55] *Van Ness 1* at 8.

[56] It is interesting to note that the Hebrew word for "retribution" or "recompense" *shillem* is also derived from the same root as *shalom* and *shillum*. Van Ness and Strong have suggested that in fact the idea of vindication came part and parcel with this idea of restitution. The concern was vindication for the victim and more generally for the law itself. However, as Van Ness and Strong rightly argue this notion of vindication has been misunderstood and misappropriated in our contemporary idea of retribution. It was not retribution in the sense of revenge, in fact they note the word for this idea is derived from an entirely different source. Instead, it meant retribution "in the sense of satisfaction or vindication." *Strong* at 9.

In this broad conceptualization of the limited and qualified place of restitution within restorative justice, there are important issues of detail: should, for example, the restitutive dimension be brought in through a direct relationship between the wrongdoer and the sufferer of wrongdoing? Should the former contribute to a fund that would help out the latter? What determines access to such funds from a restorative perspective, actual needs, (i.e. psychological help, assistance in getting back on one's feet after a violent attack, etc) or the apparent enormity of the offence? On the other side, how ought one to gauge the contribution of individual offender? How does one adjust for economic inequalities between them? Is voluntary restitution necessary in restorative justice? We will return to address the specific questions in our more detailed development of the constituent elements of restorative justice practice. We can find hints at their answers, however, in our discussion of the importance of dialogue to meet the concern over the arbitrariness of restitutionary amounts, and the importance of context in restorative justice.

There is a concern which persists with restitution. Wrongdoers with means are often quick to throw some money at sufferers, hoping society will forget the deeper wounds that need to be healed from the wrongdoing. This tactic is evident in the recent attempts of some churches in dealing with sexual abuse, in the Ontario government's handling of the Dionne sisters case, and in the Krever recommendation of compensation not linked to fault for those infected with HIV through the blood system. Calling these payments restitution or no-fault compensation suggests that the wrongdoers are something less than fully responsible wrongdoers, and, thus, actually moves us further away from the ambitions of restorative justice. This situation is a result of the general problem with restitution raised earlier, namely its failure to comprehend the non-material harms caused by wrongdoing. Restitutionary justice then does not conceive of the full nature of the wrongdoing.

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[57] *Van Ness I* at 8.

Corrective Justice

Corrective justice recognizes the intangible aspect of harm resulting from the actions of a wrongdoer. Through the use of compensatory damages corrective justice seeks to correct the inequality created through the interference with the sufferer's *rights*.[59] Thus, corrective justice answers restitution's failure to address the non-material aspects of harms resulting from wrongdoing. Corrective justice speaks the truth that wrongdoing is not just an interference with the material possession of the sufferer but with a particular right belonging to her. However, corrective justice offers the same response to such harm as restitution does for material loss, namely, a transfer from the wrongdoer to the sufferer. In applying this notion of transfer to the non-material, corrective justice reveals, ironically, the illogic of its own idea that a transfer from the perpetrator to victim will result in their equality. In maintaining the notion of transfer, corrective justice argues in effect that making the wrongdoer worse off will make the victim better off. This notion of transfer was intelligible when there was some material possession in issue. One can understand how returning twenty dollars to the victim would alleviate the financial loss she experienced from a theft and, at the same time, would take away a financial advantage gained by the wrongdoer. The problem with this conception of justice, as we saw earlier, is that it fails to take account of the other, intangible harms caused by the wrongdoing. Corrective justice attempts to take account of these harms. It tries to do so, however, by using the same mechanism, a mechanism which is wholly inappropriate in dealing with anything beyond material calculations. A material transfer cannot restore the primary loss to the victim,

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[58] To avoid confusion "recompense" or "reparation" might be used to describe the notion of restitution as part of restorative justice and to distinguish restitution as embedded in such a process from restitution as an independent

which is immaterial in nature. Instead, the result is that the perpetrator is made worse off without altering the position of the victim. It is clear why this cannot achieve the equality between perpetrator and victim with which justice is concerned. Whereas corrective justice is concerned with equality in the abstract sense, a sort of mathematical equality (i.e. if I make you so much worse off then you will be in equally as bad a position as I am), the aim of justice understood as restoration is, for the reason discussed earlier, an ideal of social equality. Thus, the old adage 'two wrongs don't make a right' holds true here. Making the wrongdoer worse off in fact moves us further away from the ideal of social equality, and, thus, further away from meeting the demands of justice. Corrective justice then shares with restorative justice the recognition that the harms begging redress after wrongdoing involve more than simply the direct material loss suffered – that, first and foremost, wrongdoing is a wrong against the rights of the victim. The theories of justice part company with respect to what is necessary to address the wrong and restore equality. Where corrective justice relies on the notion of transfer, restorative justice holds that such wrongs can only be addressed by restoring the relationship between perpetrator and victim to one in which the rights of both are respected.

Retributive Justice

Justice as restitution and corrective justice are both limited by their commitment to the notion of transfer as the means to achieve equality. Retributive justice, on the other hand, does not share this commitment. In a sense, the conception of justice retributivists adhere to is actually closer to restorative justice than either restitution or corrective justice. Retributive and restorative justice share a common conceptual ground in their commitment to establishing/re-establishing *social* equality between the wrongdoer and the sufferer of wrong. Retributive justice is, at its root, concerned with restoration of equality in relationship. Yet, as soon as one

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conception of justice.

[59] See Generally: E. Weinrib *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995).

understands this common commitment to restoration of social equality, one begins to grasp the way in which restorative justice theory and retributive theory diverge from their common conceptual ground.

Retributive theory identifies the achievement of social equality with a particular set of historical practices (typical of a wide range of societies) often known as punishment. In other words, retributive justice names punishment as the necessary mechanism through which such equality is to be achieved; it identifies the very idea of restoration with punishment. It attempts to restore social equality through retribution against the wrongdoer exercised through isolating punishment. By contrast, restorative justice problematizes the issue of what set of practices can or should, in a given context, achieve the goal of restoring social equality. Accordingly, for restorative justice theory, identification of these practices requires social dialogue[60] that includes wrongdoers, sufferers of wrong, the community to which they belong and demands concrete consideration of the needs of each for restoration.

Here we are using the term retributivist fairly informally to refer to all those theorists who hold that punishment is required to achieve justice. It is important, however, to acknowledge a distinction between those traditional theorists who argue that punishment is required for its own sake and those who have moved to offer instrumental justifications for punishment. For our purposes, what is important is that both justifications defend punishment as a means to restoration. Besides, instrumentalist theories of punishment hold little sway in current discourse attempting to justify systems of punishment. Such arguments have been discredited by the work of criminologists particularly during the 1960's and 1970's.[61] As Braithwaite and Pettit tell us,

> …positive criminology accumulated masses of evidence testifying to the failures of such utilitarian doctrines. All manner of rehabilitation programmes for

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[60] See for an example of the role of social dialogue in the realization of social equality J. Nedelsky and C. Scott "Constitutional Dialogue" in J. Bakan and D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) at 59.

[61] See generally John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990) (Hereinafter: *Pettit*)

> offenders were tried without any producing consistent evidence that they reduce reoffending rates. The deterrence literature also failed to produce the expected evidence that more police, more prisons, and more certain and severe punishment made a significant difference to the crime rate.[62]

We want to suggest, in the first place, that the reason this evidence has failed to materialize, and the programmes failed to produce the intended results, is that they are flawed. What these goals aim to achieve in terms of deterrence, rehabilitation, and elimination of recidivism, are laudable goals. However, they are unattainable through punishment. In any case, whether one is persuaded by this explanation of the failure of instrumentalist justifications for punishment or not, the fact remains that they have proved themselves false. Punishment simply does not achieve the ends these theories claim.

Instead of abandoning the idea of punishment as a result of the failure of instrumentalist justifications, however, Braithwaite and Pettit note that "…many of the brightest and best criminologists have now begun to cast around for alternative justifications for maintaining punishment as the pre-eminent response to crime."[63] They found this justification in history. Retribution has been revived as their best hope to justify punishment. "Retributivism serves [advocates of punishment] well," Braithwaite and Pettit argue, "for the community can be assured that it matters not whether acts of punishment protect them from crime; we do right when we punish because we have given people their just deserts."[64] Thus, new life has been breathed into a retributive conception of justice. However, it is too simplistic to suggest that retributive justice is concerned with nothing more than some ethereal evening of scores. If this were the case, it would be easy to dismiss retributive notions of justice as irrelevant to our human attempts to do justice - it would be properly the work of the gods. As we argued earlier, at its root, retributive justice is concerned with *social* equality. Its goal is to make the perpetrator and victim equal by giving the perpetrator his just deserts. As Martin Wright explains, the philosophical justification for retribution is eminently social.

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[62] *Pettit* at 3.
[63] *Pettit* at 5.
[64] *Pettit* at 5.

> [The justification is that] the wrong done to an individual extends beyond his own family; it is a wrong done to the community of which he is a member; and thus the wrong-doer may be regarded as a public enemy. This reflects changes in the organization of society. In a pastoral community the overlord took no notice of civil wrongs as between individuals, except to assist, for a fee, in enforcing the payment of the customary compensation. … Societies came to be personified by the Crown: 'the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community': the magistrates' power to punish derives from the social contract to which citizens notionally subscribe.[65]

Thus, retributive justice recognizes that harm from wrongdoing extends beyond the individual to the relationship between the wrongdoers, those affected by their acts directly, and the community of which they are a part. However, even while it recognizes the relational nature of justice and the aim of restoring social equality, it misses the mark with the way it tries to effect such restoration. Wright points to perhaps the clearest example of this failure as retributive justice substitutes the King for society and thus actually fails to involve the community at all.

Braithwaite and Pettit have suggested that the move from instrumentalist justifications for punishment to retributive ones was motivated by the desire to avoid the injustices happening in the name of rehabilitation and deterrence. The new retributivists, they explain, saw that, in addition to not working, instrumentalist arguments lead to all sorts of abuses — for example, people being kept in prison indefinitely, or for extended periods of time, in the name of rehabilitation, while others through trickery or bribes would receive early release. Retributivists saw punishment in proportion to the harm caused by the perpetrators' actions as a solution to the injustice of the current practices. Close examination of this idea of punishment equal to the offence reveals that it is equally as arbitrary and potentially unjust as the instrumental systems of punishment. Nevertheless, we agree with Braithwaite and Pettit that the retributivists were motivated by the right reasons but took a wrong turn. Retributivists threw out the baby with the bath water. They were blind to the positive step towards more caring and restorative mechanisms by the glare of the injustice wrought by their coercive methods.[66] Restorative justice, in contrast, manages to keep the focus on caring and restorative mechanisms while avoiding the coercion involved in penal practices. The recognition of the harm that punishment can do to the wrongdoer and her prospects for restoration, provides a stricter moral constraint on the use of retribution for purposes of social control (i.e. deterrence) than the constraint implicit in the retributivist ideal, with its concepts of agency, will, and "fit" between punishment and crime. In fact, retributivism legitimates the *passion* of revenge, or retributive anger, without carving out a stable benchmark for limiting severity of punishment (consider how unsuccessful retributivist theory is in formulating, on the basis of this idea itself, the limits on punishment for a particular offence; the *lex talionis* ("an eye for an eye", "a tooth for a tooth"), even this limitation, is merely a convention based upon the application of the idea of transfer from other ideas of justice to retribution—once we move beyond restitution and corrective justice, beyond the "transfer", why not two legs for an eye to restore the social equilibrium, measured against the subjective will for revenge which has been morally emancipated by the retributivist ideal itself?).

Owing to its commitment to punishment as the means to achieve restoration retributive justice is markedly different from restorative justice even while starting from common conceptual ground. As Howard Zehr observes, the focal point of retributive justice is individual guilt. Guilt is what justifies punishment, but the nature of the appropriate punishment is almost an after thought. Retributive justice is thus backward looking, primarily focused on what happened, and not what must be done to address it. Where retributive justice assumes punishment is required in order to restore social equality, restorative justice asks what is

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[65] *Wright 1* at 5.
[66] *Pettit* at 4.

required. We have already argued that restorative justice is forward looking. Restorative justice looks back at the past, but with a view to transforming the relationship for a better future. The focus in restorative justice is on restoring the relationship to one of equal dignity, respect, and concern, and not simply with establishing guilt. In this sense, while not aiming at "deterrence" as social control there is certainly an idea of the prevention of future wrongs within restorative justice; the idea of transformation is that of achieving a future *steady state* where the parties will remain in a relation of social equality. Finally, because retributive justice is so centrally focused on punishment as the response to wrongdoing it is focused on process – the finding of guilt and meting out of punishment. Restorative justice, on the other hand, is more concerned with the outcome of the process, than with the process itself.[67] It is flexible in terms of what must be done in response to a wrong with the one proviso that whatever is done must achieve the goal of restoration. Thus, while retributive justice understands justice in a manner akin to the Roman conception of right rules and measured by intention and process, Zehr suggests that restorative justice is best understood through the Hebrew tradition, defined as right relationship and measured by outcome.[68]

It is clear, then, that retributive justice is concerned with restoration of social equality, understood as relationships of equal dignity, concern and respect. If this conception is correct one might suggest that retributive justice looks less like a distinct theory of justice and more like a mechanism for achieving restorative justice. However, as theory or strategy the result remains the same – retributive justice cannot serve the aim of justice as restoration of social equality. Punishment is inherently isolating as it is by definition *imposed* on the individual. Punishment removes the wrongdoer from the relationship thereby precluding relationship altogether, let alone equality in relationship.[69] A key problem with punishment, from a restorative point of view, is that it is non-voluntary. Therefore, it is not the case that restorative justice will never require the perpetrator to suffer or sacrifice anything. Rather, in a restorative process the perpetrator must submit to this willingly as a result of negotiations with those affected by the wrongdoing, and as part of the perpetrator's own efforts to restore equality to the relationship.

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[67] This is not to say that the demands of restorative justice do not impose a range of important criteria and constraints on the process. See "Rights Protection" section below.
[68] *Zehr 1*

This is perhaps a good time to address a major criticism of restorative justice, namely that restorative justice is a soft option.[70] Critics charge that restorative justice is soft on wrongdoers, that it "lets them off easy." Just the opposite is true. Punishment in fact requires very little of a wrongdoer. In a retributive system the most a perpetrator has to do is passively endure her punishment. Restorative justice, on the other hand demands that the wrongdoer actively seek the restoration of relationship.[71] Indeed, punishment can actually serve to let wrongdoers avoid responsibility for what they have done because it allows them to focus on the injustice they themselves are suffering in the form of punishment. Punishment can provide a justification for the rationales wrongdoers use to defend or excuse their actions - justifying for example their feeling of disempowerment and persecution. Restorative justice requires that wrongdoers face both their victim and themselves with what they have done; it provides no escape from responsibility. We have all experienced this in our personal relationships. If you do something wrong to someone you care about you want her to tell you how to make it up to her. It is easier if she just sends you to your room or "gives you the silent treatment." You know, then, all you have to do is wait it out and everything will be okay. The much more difficult situation is when no solution is provided, where you are expected to figure out how to repair the damage you have caused to the relationship.

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[69] "Punishment is supposed to possess the value of awakening the *feeling of guilt* in the guilty persons; one seeks in it the actual *instrumentum* of that psychical reaction called "bad conscience", "sting of conscience". Thus one misunderstands psychology and the reality of conscience even as they apply today: how much more as they applied during the greater part of man's history, his prehistory! . . . Generally speaking, punishment makes men hard and cold; it concentrates; it sharpens the feeling of alienation; it strengthens the power of resistance". F. Nietzsche, "On the Genealogy of Morals" W. Kaufmann tr. And R. J. Hollingdale in W. Kaufman, ed., *On Genealogy of Morals and Ecce Homo* (New York: Vintage, 1967) II, 14.

[70] See generally *Van Ness* and *Bianchi*

[71] Not only does this system provide an escape for offenders, in many ways this system is also easier and provides some measure of escape and comfort for members of society. The individualism underlying retributivism places the focus and the blame on isolated individuals and away from society. "It enables 'us' to blame 'them', and thus to

Restoring social equality then cannot be achieved through punishment. This means that retributive justice will necessarily fail on its own terms. And, restorative justice must be sought through practices which integrate the wrongdoer so they remain in the relationship, and not through punishment which isolates the wrongdoer and removes them from relationship.

Restorative Justice

What then does the claim that justice is restorative in nature mean? Through our comparison with other conceptions of justice we have gained a clearer picture of what restorative justice is and what it is not. We will now use that discussion to create a picture of a restorative theory of justice.

Recall our earlier claim that justice is a response to a powerful moral intuition that something must be done. Restorative justice claims that what is required to satisfy this moral intuition, that 'something' that must be done is the establishment or re-establishment of equality. Note that this offers an explanation for how the instinct, that justice must be done, can arise even in the absence of any specific act or omission which disturbed the way things ought to be. If justice means equality then our moral intuition will be activated (or should be activated) whenever things are out of balance or unequal.[72] However, we have seen that justice cannot be concerned with equality in the abstract. Rather, this equality needs be a social equality. If justice is to be a human concern, then it must be focused on equality between human beings. Thus,

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avoid recognizing, finding time for, and paying for, the tasks and social reforms which could alleviate the extent and seriousness of crime." *Wright 1* at 110.

[72] In our following discussion of restorative justice practice we focus on situations where there has been a discrete wrong by an identifiable perpetrator where the victim is known. However, this does not mean that a restorative approach is only appropriate to these situations. As we discussed earlier, restorative justice is not limited to the level of individuals but can be used at the level of groups, institutions or communities. Thus, it is important to

justice must be about establishing, or re-establishing, a *social* equality, and not some abstract or ethereal notion of moral equality.

Social equality then means equality in relationship. Social equality exists when relationships are such that each party has their rights to dignity, equal concern and respect satisfied. Restorative justice aims to restore relationships. As such restorative justice is inherently relational. This is a distinguishing feature of restorative justice versus the other conceptions of justice. Restorative justice recognizes that if justice is to be meaningful for human beings, if it is to have any sway on earth and not simply in the domain of the poets or the Gods, it must take account of who we are as human selves. It must take into account a truth about human beings that has been obscured by the extremes of individualism and collectivism in Western culture. Recently, through the work of many insightful feminists who have rejected these extremes, the truth that human selves are inherently relational has been put in evidence. Selves exist in and through (are constituted by) relationships with other selves.[73] This is not to deny that we are individuated selves but rather to locate the individual within relationships.[74] Indeed, just as we are never wholly independent of other selves, we are not wholly dependent either – we are interdependent. Justice, then, as it is concerned with human selves must start with a focus on relationship. Taking relationships as the starting point for justice reasoning transforms the traditional picture of justice. This starting point generates a radically different picture from the more familiar abstract rule and principle image of justice embodied in

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address the possibility that restorative justice looks promising for dealing with longstanding issues of oppression, inequality and disparity.

[73] See generally Jennifer Nedelsky "Reconceiving Rights As Relationship" (1993) 1 *Rev. of Constitutional Studies* at 13; M. Kay Harris "Moving into the New Millenium: Towards a Feminist Vision of Justice" *The Prison Journal* 67/2 (1987): 27-38; Christine Koggel *Perspectives on Equality: Constructing a Relational Theory* (Maryland: Rowman and Littlefield Publishers, Inc., 1998)

[74] The extreme of collectivism on the one hand separates the individual and other by subordinating; the extreme of individualism on the other also separates, placing the individual above the other.

retributive theory, as this conception is founded on the individualist conception of the self and human agency.[75]

What differences does a focus on relationships make? First, it is important to review the image of justice derived from an individualist starting point, and the resulting theory of justice. Justice, as we saw through our comparison of restorative justice with other contemporary theories of justice and most notably retributive justice, came to be understood as a system of abstract rules and principles designed to protect the individual from other individuals, and to ensure their independence against the intrusion of others. It is interesting to note how this has translated itself in different areas of our legal system. In the constitutional realm it resulted in the primacy of negative over positive rights; in tort law it has meant corrective justice is used to resolve conflict between two individuals, and in the criminal realm it has lead to the concept of retributive justice (isolating punishment as the objective, individuals and discrete wrongs as the focus). Further, this conception of justice is evidenced in the adversarial model of the legal system as a whole.

How then would taking relationships and human connectedness as the starting point for thinking about the requirements of justice make a difference? Justice would be concerned about creating or protecting human relationship. In other words, justice must take connection as its goal over alienation and separation. To achieve this goal, justice must be contextual not an abstract set of rules and principles applicable to each and every situation. In order to create, promote, and protect relationships, justice will inquire into the details of such relationships and assess whether they are "right" relationships in the sense discussed above (ie: relationships of dignity and equal concern and respect). If the relationships are not ones of equality, justice must identify what is necessary to restore them to this ideal. The theory of justice that emerges here is a restorative one and it stands in stark contrast to theories of justice arising out of an individualistic starting point.

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[75] See generally Jennifer J. Llewellyn "Justice for South Africa: Restorative Justice and the South African Truth and Reconciliation Commission" Christine Koggel ed., Moral Issues in Global Perspectives (Ontario: Broadview Press,

The relational nature of restorative justice clarifies the earlier answer to the often asked question: restore to what? Now that we understand restorative justice is about restoring *relationships* it is obvious how restoration cannot mean returning things to the *status quo ante*, to their state immediately before the wrong. For wrongdoing is often not only the cause of but also results from previously existing inequality. Thus, restoring a situation to the way it was before the wrong will, in most cases, fail to address the problems in the relationship which permitted or perpetuated the abuse in the first instance. Rather, in order to address the wrong and ensure that it does not happen again, one must address the state of the relationship in which the wrong occurred and strive to establish an ideal state of equality. It is important to be reminded here that we do not mean to suggest that this ideal will be achieved the same way in each relationship. Context is vital in any attempt at restoration. It is imperative in a restorative approach that the question of what will restore a relationship to one of equal dignity, concern and respect be asked in the context of a specific relationship. The question then is not what will restore relationships generally but what will it take to restore this relationship between these parties in this context. However, the values at which restoration is aimed remain the same for each situation. Relationships of equality are ones in which each of the parties to the relationship enjoy dignity and treat one another with equal concern and respect.

Let us return then to the description of restorative justice offered by Marshall at the outset of this section. Given its focus on relationships and the importance of context in any attempt at restoring relationship it is clear why a restorative justice process must bring together "all the parties with a stake in the particular event." Also, understanding that the equality with which we are concerned is a social equality, an equality in relationships in society, it is important to

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recognize the role of the community as a party with a real stake in restoring relationships. Community is comprised of the relationships between individuals. Any harm, thus, to those relationships also harms the community. Further, the community is the context in which relationships occur. As such, they have an important role to play in restoring relationships and protecting them against future harm. In the next section we will explore the specific needs of each of these parties and their respective functions in a restorative process.

THEORY IN PRACTICE

In this section we will explore restorative justice in practice. We will seek an answer to the question: What are the constitutive elements of restorative justice practice? What, in other words, are the necessary features a process must have in order to be restorative?

In the previous section we argued that models of restorative justice are context-dependent. The importance of context in determining what is required to restore a particular relationship makes it impossible to offer one set restorative justice process appropriate to all situations. There is no single institutional model for restorative justice. As a result it is not possible to offer a blueprint of a restorative justice process against which to judge models calling themselves restorative. Each restorative justice process may be fundamentally different in design and still be entirely restorative in nature. This does not, however, leave us unable to distinguish whether a practice is restorative in nature or not. Underlying the varied forms restorative justice processes might take is a common commitment to restoration over retribution, to reintegration over isolation; a commitment to understanding community as an integral part in the creation and solution of social conflict, with an acknowledgment that whether it is focusing on restoring the sufferer of wrongdoing, the wrongdoer, or the community, the focus is always broader than the individual; a commitment to be forward-looking, to look at the outcome or implications of a wrong for the future; and a commitment to bring together all those with a stake in the development of that future.[76] It is possible then to identify the elements required of any restorative process. Such elements are necessary if not sufficient for a process to be restorative. One can then test a process against these standards to determine whether or not it is restorative. We addressed many of these elements in the theoretical section above. The objective of this section is not to argue again for the elements of restorative justice (as distinct from other models of justice). Rather, we hope to offer in this section an idea of what these theoretical imperatives mean in practice. What steps must be taken in practice to ensure a model of justice that is restorative?

The first question to be addressed is: who ought to be involved in a restorative process?[77] As argued in the section on restorative justice theory, restorative justice is concerned with the outcome of wrongdoing or conflict or with their implications for the future. In fact, under a restorative conception of justice, wrongs/conflicts demand attention precisely because they cause harm to relationships. The focus of restorative justice practices is to address and repair this harm. An important step in any restorative justice process then is to explore the exact nature and extent of the harm experienced in each situation.[78] This requires setting aside the common presumption that "victims" are the only ones harmed by wrongdoing. We must understand that communities and even wrongdoers themselves are in some sense harmed by wrongdoing. The relational focus of restorative justice makes this clear; if the harm done by acts of wrongdoing are harms to the relationships involved then the perpetrator of the act experiences harm as a member of those relationships. This is not to suggest that the only harms that interest restorative justice are the abstract harms to relationships. Rather, the tangible and intangible harms (i.e.: loss of property, income, medical bills, loss of feeling secure and safe, psychological harms etc.) follow from the breakdown in relationships of social equality. Relationships of equal dignity, concern, and respect – of social equality – would not permit such harms. It is only when there is a breakdown in or lack of social equality that wrongdoing and harm results.

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[76] Van Ness and Strong identify three fundamental propositions which they claim advocates of restorative justice seem to agree upon as those which ought to underlie any attempts to construct a restorative justice system. Again their comments are directed at restorative justice in the criminal justice context. They suggest that:

1) Restorative justice views crime as more than lawbreaking, instead crime causes multiple injuries to victim, community and offender
2) Justice should seek to repair these injuries
3) Government cannot monopolize response to crime, the community must be empowered and such response must involve the victim, offender and the community. *Strong* at 31.

[77] We are making a distinction here between who ought to be involved as participants in the process and who (which actors) ought to set up/facilitate/run such processes. The latter issue will be addressed in the section which considers agents of restorative justice.

[78] Van Ness and Strong make this point with respect to a restorative justice approach to crime. "Crime is not simply lawbreaking, it is also injury to others; it is not simply the manifestation of an underlying injury, it is also the creation of new injuries. ... As we will see, these injuries exist on several levels and are experienced by victims, communities and even offenders." *Strong* at 4.

Once we understand that harm is experienced by all parties to the relationship damaged by the wrongdoing/conflict, it is clear why a restorative approach demands participation by each party. First, if restorative justice seeks to repair harm it is imperative that each party be involved in the process in order to explain the nature and extent of the harm they experienced, and, further, to be a part of deciding how best to repair the harm. Second, in a more general sense, restorative justice seeks to restore relationship between the parties and thus must bring all the parties together as a first step towards that end.

It is important, then, to examine who the "parties" are. Who is it that is harmed by conflict and wrongdoing and thus must be a part of any restorative justice effort. We have of course already answered this question through our discussion of restorative justice theory. The parties harmed by wrongdoing include the wrongdoer and the sufferer as those directly involved and expand to the communities of which they are a part. It is worth taking a few moments to consider each of the parties in the process. While we recognize it is not possible to know the specific harms every sufferer, wrongdoer or community will experience because these will be context dependent, we are able to explore generally the role each plays in the conflict and its resolution.

Conventional understandings of justice – especially corrective and retributivist – are closely connected to an understanding of human agency that produces a notion of bipolarity; a "wrongdoer" "wills" in the relevant sense harm to a "victim" or sufferer. It is this agency, or "will" that justifies in turn the curtailment of the "wrongdoer's" own rights that is understood to be involved in the coercion entailed, even in awards of civil damages, but most obviously in punishment. In this paper we have used the categories "wrongdoer" and "sufferer of wrong" to indicate, in the broadest sense, parties who will need to be involved in a given restorative process. When used with respect to restorative justice, which eschews coercion in the strict sense, these references do not have to be attached to the conventional assumptions about agency. These conventional requirements of agency have created great theoretical difficulties where claims of justice have intergenerational elements, where wrongs are embedded in complex collective behaviour or particular organizational structures (genocide, systemic discrimination, patterns of sexual harassment in a workplace, responsibility of commanding officers vs. subordinates in the Somalia situation, etc), or where a solution to the problem cannot seriously be contemplated without a party being implicated in the process who is neither a wrongdoer nor a sufferer of wrong in any simple sense (the non-abusing spouse, for example, in a child abuse case, or fellow workers in a sexual harassment situation).

Restorative justice asks the question of who needs to be restored beginning not from the classic view of agency (who is the subject and who the object of the willed wrong), but from the needs of all those affected by the wrong. These will differ, clearly, depending on the nature of the relationship to the wrong. But to need restoration does not mean one fits into the classic categories—offender, wrong-doer, perpetrator, or victim. In using language below in identifying different kinds of needs for restoration, we do not want the conventional baggage of agency imported into our analysis.

Victims/Sufferers of Wrong

The language of victimization is common parlance in contemporary Western culture. With the aid of social science and social psychology it seems everyone can find someone or something to blame for their actions and station in life. In particular, theories of social determination have lead to a situation where everyone seems able to claim victim status. This is not intended to disparage these theories, it is simply to point out the difficulty one faces in attempting to identify and address the needs of victims in a restorative process. This difficulty is compounded given that, from the restorative justice perspective, the offender and the community are also understood to experience harm. Are they then victims as well? The problem is: how is it possible to talk of victims of wrongdoing or conflict in any meaningful way if everyone qualifies as a victim?

It seems clear that we must make a distinction in order to understand who it is we are referring to when we use the term "victim." We must distinguish victims from other parties who suffer harm or injuries as a result of the conflict. The restorative perspective makes it clear that not only the victim but both the wrongdoer and the community are injured by wrongdoing/conflict. This might lead some to conclude that each of these parties is "victim," to identify harm/injury with victim status. This conclusion, however, ignores the important issue of the source and relative position in relation to the harm/injury. It is this distinction that causes the instinctive reaction against viewing the wrongdoer as victim. While it is true that the wrongdoer does in a certain sense experience harm and injury, this alone does not render the wrongdoer a victim or suffer of wrongdoing in the same sense. There is an important difference between the wrongdoer's experience of harm and the "victim's" experience – namely, that the wrongdoer's own actions have brought about both the harm they experience and that to which the victim is subjected. Victims then are harmed as a result of the actions of another.[79]

Within the category of victim there is a further distinction worthy of consideration. Given that the aim of restorative justice processes is to address those harms/injuries which have resulted from the wrongdoing, it is important to distinguish the needs of those victims who have been directly harmed by the wrongdoer and those victims whose injuries are more indirectly related.

This distinction is not intended to exclude indirect victims from the category of victim or from participating in the restorative process, or to revert to a narrow, conventional understanding of agency. However, it is important to recognize that these victims are situated differently with respect to the wrongdoer and her obligation to make reparation. As a result of the indirectness of the harm experienced by secondary victims, other factors beyond the actions of the wrongdoer may have contributed to the injury. It would not then be fair to expect the wrongdoer to be able to repair these injuries. Beyond the fairness concern, such victims are also unlikely to have their injuries adequately addressed if they do not fully explore their causes.

Van Ness and Strong also highlight the challenges involved in offering reparation to secondary victims. As they explain, it is not that reparation is not due in some cases. Rather, the difficulty is in determining the amount and extent to which the wrongdoer is responsible.[80] Further, they suggest this distinction is important in order to determine priorities in the case of limited resources. Priority must be given to the primary victim(s) who has suffered direct harm as a result of the wrongdoer's actions.[81]

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[79] The school of thought Victimology offers a different perspective. Victimology was so named to distinguish it from Criminology and its focus on criminals. Victimology looks at the ways in which the victim was involved in and responsible for crime. In his 1968 work Stephen Schafer argued that "[i]n a sense, the victim shapes and molds the criminal and his crime." See: *Victimology: The Victim and His Criminal* (Reston, Va.: Reston Publishing Company, 1968) at 34. Daniel Van Ness explains that victimologists separated victims into different categories according to their level of responsibility for the crime. Three basic categories developed: the unrelated victim, having no responsibility for the crime; the provocative victim, whose actions provoke the offender; and the precipitative victim who does not act to provoke the criminal but whose behaviour entices the offender. Daniel Van Ness *Crime and its Victims* (Illinois: Intervarsity Press, 1986) at 29 (Hereinafter: *Van Ness 2*) . Also see generally: Stephen Schafer "The Beginning of Victimology" Burt Galaway and Joe Hudson eds., *Perspectives on Crime Victims* (Toronto: The C.V. Mosby Company, 1981) 15 (Hereinafter: *Crime Victims*); B. Mendelsohn "The origin of the doctrine of victimology" *Excerpta Criminologica* 1963, 3(3); H. von Hentig *The Criminal and His Victim: Studies in the Sociology of Crime* (New Haven Conn: Yale University Press, 1948). We clearly do not want to suggest that the victim is "responsible" for the harm she experiences. In fact, we identify this as the distinguishing feature of victims as opposed to wrongdoers. However, victimology does offer an important caution against viewing the relationship between victim and offender too simplistically. In many instances (particularly where the

Even though they identify the need to distinguish between primary and secondary victims, Van Ness and Strong maintain that it is possible to identify certain needs common to both. Accordingly, they claim that all victims have two basic needs: to regain control of their own lives and to vindicate their rights. These two needs are, of course, connected. In terms of our earlier discussion of restorative justice, victims need to have their injuries addressed and repaired, and it is only when this has occurred that they will be in a position to regain control over their lives. The second need is related to the first. In order to begin the process of restoration, victims need to have their rights acknowledged. They need recognition of the fact that a violation has occurred. This acknowledgment confirms the ideal of restoration for the victim. In essence telling the victim that this is not the way things should be affirms their expectation of relationships of social equality.

The primary need of victims then is the need to restore relationship. However, this cannot be achieved simply through acknowledgment and reparation. In order to achieve restoration of relationship, the injury suffered by the victim must be repaired. At first blush one might think this requires efforts only on the part of the offender; after all it is the offender who has caused the harm and thus the offender who must make reparation. However, victim's needs extend beyond reparation by the wrongdoer, to the community. The very fact of being a victim

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victim and offender are known to one another before the wrongdoing/conflict) there are factors on both sides leading up to the specific harm-causing event at issue.

[80] *Strong* at 54.

[81] Van Ness and Strong offer diagrams for who should be compensated. *Strong* at 92-92. While we agree that there may be a concern with limited resources with respect to material (tangible) damages, often the indirect harms experienced by secondary victims are intangible and might be addressed through participation in a restorative justice process and the plan of action arrived at through this process.

can often lead to further victimization by society. It is generally obvious to most people that one of the needs of perpetrators following wrongdoing is that of reintegration. The offender by her actions has cut herself off from society and society has isolated physically or otherwise the wrongdoer. Thus, one of the primary needs of wrongdoers in any attempt at restoration is reintegration into the community. It is considerably less obvious why reintegration is necessary for victims. However, a close examination of the experience of victims proves this to be a pressing need for victims as well as offenders.

Victims often share the wrongdoers's experience of being cut off from society. This can happen in a few different ways. The victim or her experience might be ignored or perhaps more commonly explained away as being the result of one thing or another the victim did or did not do. This type of reaction to victimization has been referred to as the "blame the victim" response. Van Ness explains that this response is often prompted by our own fears. "Because we are afraid of crime, we sometimes have trouble dealing with victims. They remind us of our own vulnerability, in the same way that someone with a terminal disease reminds us of our mortality. So we ignore them, we shun them, we blame them. The victim becomes invisible."[82] Victims are stigmatized by the community in such a way as to isolate them from the community.

Thus, it is important not only for the victim to have an acknowledgement from the wrongdoer that what happened to her was wrong and not her fault, it is important for that acknowledgement to come from the community. Conflict, as we have explained, harms the relationship between the victim and the wrongdoer and in so doing harms the community. Because the relationship between the victims and the wrongdoer is a social one, and it is through such relationships that each relates to the whole of community, harm to the specific relationship is also harm done to the relationship between the victim and community and the perpetrator and community. This harm must then be addressed if a process is to bring about restoration. The victim must be reintegrated into the community.

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[82] *Van Ness 2* at 28. Van Ness also suggests that this victim blaming mentality may be behind the early trends in victimology, seeking to ascribe responsibility to the victim for her part in the crime.

Restorative justice processes must then include the victim in their attempts at restoration. But what is it that they ought to offer to victims in order to bring about restoration? In short, victims must be empowered through the restorative process. In order to address their needs, their experience of harm must be heard, acknowledged, and repaired. This requires the participation of both the perpetrator and the community.

Howard Zehr provides us with what he refers to as a "restorative justice yardstick" in order to evaluate whether a process is restorative or not. With respect to victims Zehr asks the following questions among others in order to evaluate the restoring potential of a process.

Do victims experience justice?

- Are there sufficient opportunities for them to tell their truth to relevant listeners?
- Are they receiving needed compensation or restitution?
- Is the injustice adequately acknowledged?
- Do they have a voice in the process?[83]

Wrongdoers

Before we can go on to discuss restorative processes in general there are a few issues with regard to wrongdoers that warrant attention. First, and perhaps most contentiously, a restorative justice perspective requires an acknowledgement that wrongdoers experience harm as a result of wrongdoing. As explained in the section on restorative justice theory, restorative justice recognizes that wrongdoing and conflict harm relationships, thus bringing injury to all parties to the relationship – the victim, wrongdoer and the community. In our discussion of victims above we noted why such acknowledgement has often been met with hostility. People do not want to admit that the perpetrator experiences harm as a result of her actions for fear of turning the perpetrator into a victim and thereby offering an excuse for her behaviour. The concern here is that recognizing the injuries a wrongdoer might suffer allows them to focus on these injuries and avoid taking responsibility for their actions. However, acknowledging the harm wrongdoers experience is actually a crucial step towards their taking responsibility and being accountable for their actions. It prevents wrongdoers from focusing on the fact of their injuries and hiding from facing the ramifications of their actions. As we mentioned earlier in discussing the current retributive system, bringing harm to bear on wrongdoers by failing to recognize the harm they experience allows wrongdoers to avoid dealing with the harm they have caused others or, worse, provides a way to rationalize or justify the harm they have done to others. Recognizing the injuries to wrongdoers, however, has the opposite effect. It gives them space to deal with these injuries and opens the way for feelings of empathy towards the harm others experience instead of resentment that the injuries of others are addressed while their own are ignored. Acknowledging the wrongdoers' experience of harm allows the wrongdoer to deal with those feelings and to understand the experience. Wrongdoers' then have some foundation out of which to understand the experience of their victims. They are able to know how others feel because of how they felt. If the injuries to wrongdoers are ignored it sends the opposite message, and wrongdoers might reason that since nobody cares about them and their injuries why should they care about anyone else. The feeling of empathy is important in a restorative approach. It allows the wrongdoer to hear and understand the victim's story of her experience. Such understanding is crucial for both reconciliation between the victim and the wrongdoer, and for efforts to arrive at an appropriate agreement to repair the damage, and restore the relationship to one of equal dignity, concern, and respect.

Acknowledging wrongdoers' injuries is not an uncomplicated task. The injuries wrongdoers suffer are often a complex mix of those which pre-date and contribute to the wrongdoing and those resulting from the wrongdoing. It is not often possible to decipher one from the other, nor is it desirable from a restorative justice perspective to do so. Restorative

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[83] *Zehr 2* at 230.

justice seeks to restore relationships. Such restoration is only possible if each of the parties is empowered to participate fully. This requires that the injuries to each party be addressed. Thus, with respect to wrongdoers, a restorative process must empower them to take responsibility and be accountable for their actions. Very often this will require addressing any of the wrongdoers' injuries which might prove prohibitive.

One of the major injuries wrongdoers need to have addressed is the alienation and isolation from community they experience as a result of their wrongdoing. In other words, wrongdoers share the same need for reintegration that victims experience.[84] The community stigmatizes both victims and wrongdoers. Ironically, even though they occupy very different moral positions, the motivation for stigmatization is similar in both cases. We blame the victims in an effort to assure ourselves that we could not be one of them. We blame the wrongdoer in an effort to assure ourselves that she is not one of us, that the wrongdoer's actions are anathema, the acts of one crazed or deviant individual, divorced from and not connected to or the result of the community to which she belongs. Wrongdoers are treated as outcasts as a means of separating them off from the rest of us as something different. In the same way people want to believe something like "that" could never happen to them, people need to believe they could never do something like "that" either.

Reintegration of the wrongdoer into the community is important to the success of a restorative programme in another way. Not only does it enable the perpetrator to hear and understand the experience of the victim, to take responsibility for the harm she caused to the victim, and to come to some plan for reparation to the victim, reintegration is crucial if reparation is to be achieved. In order for wrongdoers to fulfill an agreement to make reparation to the victim, access to the means to do so must not be blocked. If the wrongdoer continues to be isolated from the community she will be unable to make reparation to the victim.

Part of this reintegration need might be served through the recognition of the wrongdoer's injuries and through the community participation in the restorative process itself. However, there are other tangible steps that must be taken beyond the restorative process if the wrongdoer is to be reintegrated. For example, removing barriers to active involvement/participation in the community is essential including adequate housing, food, employment, education, training, community support etc.

We are not suggesting that the community is responsible for giving wrongdoers the means to make reparation. Rather, we are suggesting that a commitment to restorative justice is a commitment by a community to ensure that wrongdoers are not stigmatized such that it is impossible for them to make reparation to the victim. Given the societal prejudice against wrongdoers, removing barriers to reintegration may require more than refraining from erecting barriers. It may require an active role by the community to reintegrate wrongdoers. Reparation agreements, of course, should also be sensitive to what is feasible. While the community ought to ensure that the wrongdoer has the opportunity to make reparation, the agreement should not set an amount that is impossible to fulfill.

We also need to be clear about the reasons for reintegration. We suggested that without reintegration the chance that the victim will receive reparation is slim. But it is important not to confuse this point in favour of reintegration with its rationale. We do not mean to suggest that the reintegration be undertaken in order to ensure benefits to the victim. This would be to use the wrongdoer as a means to an end. Rather, we are suggesting that a commitment to restoration requires that the perpetrator be given an opportunity to repair the injury she has caused to the victim and that the perpetrator be reconciled with the community such that she may participate on equal footing in relationships with fellow members of society. Clearly this is necessary if one hopes to restore social equality.

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[84] *Strong* at 112.

Community

In order to discuss the role of the community in restorative justice we need to be clear about what we mean by community.[85] Van Ness and Strong point out three main uses of this term that are relevant for our purposes.[86] A community might be based on geography, interest, or it might be used to refer to society as a whole. Each of these types of communities can be harmed in different ways and to different degrees by conflict and wrongdoing. Thus, it is possible for each to participate in the process of restoration in different ways. They might each play different roles according to what is required in the specific context at issue. For example, immediate interest communities might offer support to either victim or the wrongdoer in a restorative process. We are thinking particularly of those individuals close to either party by means of familial relationship or generally as a care giving community. Or, an interest community could serve in place of the victim if the victim is not able or willing to participate.[87] The geographic community might be affected, for example, in the case of burglary or other wrongdoing based purely on location. Admittedly, dividing communities along these lines is somewhat arbitrary for these communities are not wholly distinct from one another. For example, the geographic community actually becomes an interest community of victims in the case of neighbourhood robberies/theft.

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[85] We must acknowledge the difficulty of defining notion of "the community" central to restorative justice. What is clear is that this idea must be contextualized to each particular challenge of resotration. The relevent community for a particular restorative justice process will be one comprised of those with a stake in the situation. One of the difficulties, of course, is that these communities will not always be identifiable before the process itself. This does not pose, however an insurmountable obstacle to restorative justice. In fact, it may highlight what is an advantage of such processes, namely that in bring together those with a stake in particular situation the process is able to generate and strengthen community. The case of South Africa provides an illustration of the complexities of identifing the relevent community (communities) for the purposes of a restorative process. The Truth and Reconciliation Commission process in South Africa encompassed different communities and the relationship between them. For example, the immediate support communities of both victims and perpetrators were involved in the process (families and friends), the wider racial and ethnic communities drawn along the historical apartheid divides and the process itself was a central element in the building of a general South African commuonity (society).

[86] *Strong* at 32.

[87] This is the idea behind victim/offender panels or groups. Van Ness and Strong explain that "[a] victim- offender panel (VOP) is made up of a group of victims and a group of offenders who are usually linked by a common *kind* of crime, although the particular crimes of which they were the perpetrators or offenders are not in common." Lanuay and Murray describe such a project in England called Victims and Offenders in Conciliation (VOIC) aimed at addressing incidents of burglary. "The purpose is twofold: first to help victims to come to terms with their burglary; second to confront offenders with the results of crime." These programmes bring offenders together with groups of victims. The offenders and victims are not connected in a direct way. Rather, they are connected by their involvement in burglary. Such panels are an option when a particular victim is not willing or able to meet with their offender. Instead, offenders meet other victims of the same crime and hear their stories and experiences. The victims also benefit from this experience. They are given a chance to humanize offenders and to understand their motivation and experience in cases where their offender is not available or willing to meet with them. See: Strong at 74; Gilles Lanuay and Peter Murray "Victim/Offender Groups" Martin Wright and Burt Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Newbury Park: Sage Publications, 1989) at 113; Gilles Lanuay "Bringing victims and offenders together: a comparison of two models" *Howard Journal*, 24: 200-12; Tony

Van Ness and Strong note that geographic or interest groups are generally more directly affected by the wrongdoing or conflict than is society. We have already explored the reasons why the community, in the sense of society in general, is implicated and affected by conflict and wrongdoing. Thus, society will always be involved in the restorative process along with the other communities affected by and involved in the conflict or wrongdoing. While the contextual nature of restorative processes leaves room for various types of community involvement, and the different ways and extent to which they were harmed by an event, Van Ness and Strong suggest that one can, nevertheless, make the generalization that communities are harmed when the safety or confidence of their members is threatened.[88]

In the above two sections we have addressed the need for victims and wrongdoers to be reintegrated into community. What may not be quite as obvious is that reintegration is needed as much for community as for individual wrongdoers and victims. The community needs to reintegrate its members because disintegration and fragmentation weaken the community.[89] Further, in the process of coming together in an effort to restore relationships and reintegrate victim and offender, the community continually reconstitutes and strengthens itself.

Thus, for restorative justice, community is both subject and object; restorative justice is realized in the community and is at the same time transformative of that very community. A restorative approach to justice offers communities the chance to heal themselves from the

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Marshall *Reparation, Conciliation and Mediation* Home Office Research and Planning Unit Paper 27 (London: HMSO, 1984).

[88] *Strong* at 120.

harmful effects of conflict/wrongdoing. By bringing the community together in an effort to address a specific situation, a sense of community is restored and the community is enabled to participate in the resolution of the conflict and reinforce the values of a healthy community.

Restorative Process

Now that we have taken a brief look at the parties involved in a restorative process we must turn our attention to the process itself. We have a sense of who is involved, now let us ask the question: how are these parties to work towards restoration? Here we will inquire into the structure or functioning of the restorative process. What are the various elements of any restorative process? How are these elements structured? How do they relate to one another?

Another and perhaps preliminary question is who initiates a process of restorative justice? The simply answer to this is that any one of the "parties" we have identified can initiate a process. Thus, it is not left to either the wrongdoer or her victim to initiate such a process, as is often the case in victim/offender mediation programmes. Instead, it is appropriate and often necessary for the relevant community (note this can in some cases include society more generally) to establish[90] a restorative process.

Elements of Restorative Justice Practice

Mark Chupp in his article *Reconciliation Procedures and Rationale*[91] describes the process followed in a restorative process as one of "facts, feelings and restitution". For reasons we have discussed we would substitute reparation for restitution (restitution being only one part

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[89] Rupert Ross in his discussion of Hollow Water emphasizes the importance of healing the community if one is to heal the individual. See: Rupert Ross *Return to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books, 1996).

[90] As we will address both the victim and the perpetrator's participation must be voluntary. This does not mean that the community cannot establish a process and encourage individuals to participate. Attention must be paid, however, so that encouragement does not result in forcing individuals to participate. While wrongdoers cannot be forced to participate in a restorative process, failure to do so justifies and in many cases requires the community to take necessary measures to protect itself against further harm from the wrongdoer.

[91] Mark Chupp "Reconciliation Procedures and Rationale" Martin Wright and Burt Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Newbury Park: Sage Publications, 1989) at 56.(Hereinafter: *Chupp*)

of reparation) however this structure seems a good starting point for identifying the elements of a restorative process.

The first component of a restorative process we identify as "truth-telling." This element addresses the "fact" portion of Chupp's description. That it is necessary to found restoration on truth and not deception is obvious, but we intend something more by our suggestion that the activity of truth-telling is an important element of a restorative justice process. Truth telling is important within the process itself and as a precondition of the process.

First, as we have already argued, participation in a restorative justice process must be voluntary. One way to ensure this is the case is to require the perpetrator to acknowledge what happened at the outset. Thus, in order for a restorative justice process to occur the perpetrator must first admit what she has done. At first glance this may appear to be a huge limitation for a restorative approach, permitting restorative processes only in those cases where wrongdoers are willing to admit responsibility. Leaving aside the question of what percentage of wrongdoers "settle" in the current system, a response to this problem might be found from within the restorative perspective. The switch to a restorative justice approach may actually prompt more perpetrators to admit what they have done in an effort to repair the damage they have caused. Whereas the objective of the retributive system is to prove guilt in order to justify punishment (or civil responsibility to justify a "transfer" such as damages), the object of a restorative system is to repair the harm done by the wrongdoing. In a retributive system there is built in incentive for perpetrators to hide or lie about their actions. The requirement that one admit what she has done would indeed be a formidable limitation under such a system. However, a restorative system is not interested in establishing guilt with a view to punishment. Rather, it is interested in determining what happened in order to address the wrong. Thus, in a restorative system it is in the wrongdoers' best interest to admit what happened as this brings them closer to resolving the situation.[92]

While truth telling is an important precondition for any restorative process, it also plays an important part in the process itself. As Chupp suggests, a restorative process must address the facts of the situation. The reason for this is intuitively obvious: in order to repair the harm and attempt to restore the relationship, one must know what happened. Thus, any restorative process must be founded on and begin with truth telling. Within the process, however, truth telling is not limited to the wrongdoer as it is before the process begins. Once the process has begun it is important that both wrongdoer and victim relay the story of the incident, and their experience of it, fully and honestly if restoration is to be successful.

Encounter

This brings us to this issue of the structure of restorative justice processes. We have suggested the truth telling is important within the process, that both victim and perpetrator must relay their stories of what happened and their experience of the event. Truth-telling itself is not enough to meet the needs of a restorative process – that is to say, it is not enough simply to tell the truth, the truth must be told to and heard by the other parties involved. We call this element of restorative justice practice "encounter". Encounter is one of the key elements of restorative justice practice. It is the context in which everything else happens. Recall our description of restorative justice borrowed from Tony Marshall:

> Restorative justice is a process whereby all the parties with a stake in a particular offence *come together* to resolve collectively how to deal with the aftermath of the offence and its implications for the future. (emphasis added)

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[92] It may also be easier to admit what happened in a restorative system because, as Wright notes, this does not require an admission of guilt in the legal sense. The contextual nature of restorative justice allows the perpetrator to offer an explanation of what happened instead of imposing the all or nothing choice of guilty or not guilty as in the retributive system. For example, in a restorative system a perpetrator might admit that they harmed the other person but claim that they did not intend to do so. This allows the perpetrator to take responsibility for her actions and opens the door to repairing the harm done. Restorative justice promotes understanding and explanation of the event over simply attaching a label to it.

Notice that Marshall does not say the parties are simply involved or their input solicited. Restorative justice is not "shuttle diplomacy." Encounter brings the parties face to face with one another.[93] Through this meeting parties confront and challenge one another's stories of the event. It is in such confrontation and challenge that truth is found. "Truth" is a difficult and illusive concept. There is much debate about the extent to which "Truth" – objective truth - is possible. Truth telling embedded in the context of encounter makes clear the kind of truth restorative justice seeks – it is the intersubjective truth born out of the confrontation between subjective truths.[94] This is what Herman Bianchi refers to as relational truth. He explains that this concept "implies that truth is always and everywhere a social notion, part of a structure of interaction." Relational truth, as Bianchi describes it, is neither subjective nor relative. Rather, "[i]t stems from confirmation of the hard fact that truth is always someone's interpretation of reality. Truth exists between people and is a datum to be activated."[95] This concept of truth is a natural fit for restorative justice given its commitment to a relational vision of the human self. Justice understood restoratively is concerned with "right relationship" and the truth it seeks is that which emerges from those relationships. This truth is "much more than just an answer to the question of whether the criminal has really committed the crime and under what circumstances. It is concerned with whether we are capable of ruling out the conflict generated by the crime and how we can make life worth living again for both victim and criminal."[96] The very search for and discovery of relational truth is a step towards restoration.

Bringing people face to face with one another dispels the myths and stereotypes each has of the other.[97] It allows the perpetrator to see the victim, hear her story and experience in her own words; allows the victim to see the wrongdoer as a person instead of some evil or heartless criminal; and it allows the community to see the truth that both victim and wrongdoer are not unlike the rest of the community. Encounter then is fundamental to reintegration as it challenges the stereotypes that justified segregation.

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[93] The challenge of restoration where this is not possible, for example where the victim is dead, will be addressed in the section below entitled "Challenges for Restorative Justice".

[94] See Generally: Michelle Parlevliet "Considering Truth. Dealing with a Legacy of Gross Human Rights Violations" *Netherlands Quarterly of Human Rights* 16:2 June 1998 at 141.

[95] *Bianchi* at 24.

[96] *Bianchi* at 26.

[97] *Peachey* at 18; *Strong* at 87.

In the words of one wrongdoer: "When I faced my victim, it scared the living daylights out of me and it hurt… but when I had to sit there and tell somebody 'Hey I ripped you off,'… it created a relationship with me and them."[98] It is important to note that we take the position that a relationship already existed between the wrongdoer and victim in the sense that we are each in relationship with one another. What this wrongdoer describes as the creation of a relationship through meeting face to face was in fact the recognition of that relationship, that connection to each other. With this recognition comes obligations and responsibility. It is interesting here to look at the language of "my victim" as evidence of this connectedness and the feeling of responsibility for that individual's victimization it brings.

Finally, encounter is important in another respect. We have suggested how encounter is fundamental to establishing the "fact" element of restorative justice practice, but it is also key to the second element in Chupp's description – feelings. Encounter makes room for the expression of feelings in restorative justice practice. It does so by bringing the parties together so that they might tell their own stories to one another. To be clear, we are not suggesting that parties are required to lay their emotions bare in a restorative process – this would not be restorative for many individuals and in fact might cause more harm. However, for a process to be restorative the parties must be free to express their feelings for very often these are as important to restoration as facts.

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[98] As quoted in *Chupp* at 56 from ABC Documentary Special *Going Straight* (Hollywood: Dave Bell Associates, 1982).

In order for encounter to make good on the promise it holds for restoration certain features must be ensured. First, encounter must be driven by the participants. This does not mean that there is no role for a facilitator in restorative processes. In fact, a facilitator is crucial. Without a facilitator to bring the parties together, structure the discussion, help set the guidelines, and ensure that they are followed, no restorative process would be possible. For the facilitator is required because of the crucial role of society in restorative justice. The respective needs of wrongdoer and victim for restoration must be balanced and integrated with a view to social equality. This requires participation of individuals who do not themselves require restoration because they are victim or wrongdoer in this particular situation and thus whose perspective is able to include a broader social element. However, the role of the facilitator must not extend beyond this – in other words the facilitator must ensure a process that reflects the distinctive criteria for restoration of social equality without attempting to guide or predetermine the outcome. She ought not to have any role in directing the content or outcome of the process. A facilitator may serve a symbolic role of community involvement if she is drawn from the community. Even then, however, it must be restricted to the symbolic because the community must have an explicit role in a restorative process far beyond that which would be appropriate to a facilitator.[99] Encounters then ought to provide the participants with an opportunity to decide what is important to their situation and decide on the right resolution for them without interference from the facilitator. By allowing the process to be driven by the parties involved, encounters are able to take into account the broader relationship between the victim and perpetrator and are not limited in developing a plan for the future by the specific event that brought them to the process.

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[99] Note here the distinction between restorative justice processes and existing victim-offender reconciliation projects where the community involvement in the latter is restricted to the symbolic representation through an impartial mediator (often volunteers drawn from the community).

The second important feature of a successful encounter, we have already touched on briefly, is narrative. Encounter is much more than simply bringing the parties face to face. That, in and of itself, would accomplish very little. Encounter, as we intend it, is a much more substantive notion. It means not just meeting but engaging the other. This engagement is achieved when room is made for the parties to tell their stories, relay their experiences, and when they are listened to with respect.[100] This imperative of personal narrative means that what is to be included and excluded in the process is limited only by the bounds of respect set on the encounter itself. Thus, whereas emotion is precluded from our current justice process it is not only allowed but, as we have discussed it, plays an important role in restorative justice processes. Very often it is the only way to capture the nature and extent of the harm experienced – that which requires repair. However, understanding why allowing emotion is necessary for narrative, and, thus, restorative processes in general, also makes clear why it can never be forced. To force emotion would be to co-opt the narrative, and hinder empowerment of the victim and the offender in their encounter.[101]

Rights Protection – Addressing Power Imbalances

The concept of "due process" is very important to our current justice system. Due process guarantees are procedural protections intended to guard against abuse and the violation of rights. Given the exclusive focus of our current systems on the perpetrator, it is not surprising that such guarantees exist for the perpetrator and not for the victim.[102] When the state replaced the victim in the criminal justice process, the extreme power imbalances this created demanded such protections.[103] In the criminal context at least, one might think that a restorative process in removing the state and returning the victim as central to the process could ignore so called "due process" concerns. However, quite the opposite is the case. While it is true that the wrongdoer is no longer pitted against the powerful state with seemingly unlimited resources, the move to a restorative system might raise different yet equally important rights concerns for both victim and perpetrator. In fact, one might argue that given the contextual and less systematic nature of restorative justice processes, the possibility of abuse is in some ways greater than in our current highly regulated and structured system. Restorative justice processes must then be concerned with the possible power imbalances between parties within the process and in arriving at an agreement, as well as the use of coercion and pressure tactics to make individuals participate initially. Thus, it is important in considering restorative justice practice that we consider the need to protect the rights of participants in such processes. In some sense, then, restorative justice as a process has to embody what it seeks to achieve as result, namely equality; conversely, part of the restorative result may itself come from being treated as an equal in the process itself.

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[100] An important counter-part too narrative is listening. All too often we forget to look past the obvious active parts of a process to the other components without which the process would fail. Listening is a key part of the process – without it narrative is meaningless as no one hears it.

[101] *Strong* at 71.

[102] This is so despite the work of victims' rights groups particularly in the United States to entrench victims' rights in their constitution.

We have already addressed the need for voluntariness with respect to participation in our theoretical discussion of restorative justice. In practice this requirement entails protecting both victims and wrongdoers from being forced to participate. We have suggested, with respect to wrongdoers, that one way to avoid forcing them to participate is to ensure they only participate after willingly admitting responsibility. Ensuring voluntariness for victims is harder. It requires that the process be completely and carefully explained to them and that they be given room and support to consider their choice whether to participate or not. Chupp suggests that in order to protect against the use of coercion and manipulation (even that motivated by the best of intentions) pre-meetings must be held with both the perpetrator and the victim before entering into a restorative process. These sessions might achieve a number of objectives including: the chance to listen to the individual's story so she feel heard; the opportunity for the facilitator to gain an understanding of the situation with a view to figuring out who ought to be involved in the process, the nature of the conflict and possible power imbalances; and, perhaps most importantly, to explain the process to both the victim and the offender and to ensure that each party has the information and the tools required in order to make informed and genuine choices about participation.[104]

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[103] It is interesting to note that similar protections do not exist in the civil system where the victim remains a party to the case and in control of the prosecution.

Once voluntariness is assured the problem of power imbalances within the process which might influence negotiation of an outcome remains. Power imbalances can exist for different reasons. They might exist owing to the nature of a previous relationship between the parties (i.e.: abusive spouse) or different social status (i.e.: wealth, age, sex, race). Power imbalances are often difficult to detect as very often the person most in need of protection feels silenced by the power difference. Thus, setting up a restorative justice process requires listening to the quietest voices, and might require asking those surrounding the participants to discover the true nature of the relationship. Addressing imbalances also involves the community. Often, ensuring that both parties have support people around them, and ensuring that such support people are fully included and empowered to participate in the process, can "even the scales" between victim and wrongdoer.[105]

While the participation of a community of support can go a long way to addressing the effects of power imbalances on a restorative process nevertheless one can not dismiss the fear associated with encountering another with whom one has conflict. This fear is particularly latent for some victims. This was in fact one of the reasons the criminal justice system was introduced in the form in which it exists today – to protect victims from further fear and intimidation from their perpetrators, and to prevent perpetrators from having access to victims.[106] While victims are clearly not served by the current system, and in fact still suffer fear etc. because they are alienated from the process and thus have no way to face and address what happened to them, it is still important to recognize the motivating desire to protect victims and ensure that any alternative take seriously this need of victims. Restorative justice processes must then protect victims. Perhaps the best way to do this is by empowering victims so that they do not feel vulnerable to further harm from the perpetrator. The provision of support and recovery services aimed at enabling the victim to make an informed choice about participation should be carried out with a view to providing such protection to victims. In addition, measures must be taken to prepare victims for such participation, including preparation before the process. Participation of support people within the process, as discussed above, is also essential.

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[104] For example, ensuring that the choice to participate is a voluntary one might entail the existence of support systems for victims so that they have the help needed to recover enough to make a considered and informed choice about participation. See: *Chupp* at 58.

[105] John Braithwaite, in conversation with the authors, related an anecdote of a facilitator coming to him saying she could not find any support people for a perpetrator involved in the restorative justice process for which she was preparing. Braithwaite's response to her was to try harder. Braithwaite contends, and we agree, that it is possible at least in principle to find a community of support for everyone, one just has to look harder in some cases.

Fully correcting power imbalances, however, will sometimes be harder said than done. The fact that they need to be addressed in the process, does not mean that the process itself can actually solve the imbalances themselves. The ideal goal of restorative justice may in fact imply important social transformations beyond what can be achieved in any process specific to those directly involved in the wrong. Thus, while conceiving restorative justice as justice means that the task cannot be *reduced* to social therapy or social perfection generally, restorative justice is open to the possibility that a process of the kind described may not fulfill the ideal of equality in society without changes that go beyond things that wrongdoers and victims themselves can undertake. We have already alluded to the need for social support for various particular elements in the restorative process.

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[106] See Helen Reeves "The victim support perspective" Martin Wright and Burt Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Newbury Park: Sage Publications, 1989) at 47. It is important to address a common misconception about power imbalances in restorative justice processes. When we speak of protection in this context most often it is assumed that it is the victim who requires protection. While it is often true that victims must be protected from being re-victimized and secure from their fears that the perpetrator will have access to harm them again, it is also often the case that it is the perpetrator in a restorative process that has the least power. This is particularly true in the case of power imbalances resulting from social status. Frequently, perpetrators are from a lower socio-economic background, minority or other disadvantaged group. Couple this with the fact that victims generally have much more support coming into the process and it is clear why careful attention might have to be paid in order to ensure that the perpetrator is supported in the process.

None of this should minimize, however, the extent to which the way the process itself is conducted is central in protecting the rights of participants. Before the process begins the parties must be a part of deciding upon and committing to guidelines or "ground rules" for the process. These "ground rules" are slightly different from the power balancing measures discussed above. They are less structural in terms of who will attend the meeting and how the meeting will be run (i.e.: allowing individuals to tell their stories etc.). These issues, while they ought to be explained and agreed to by the parties, are not properly the subject of negotiation. The "ground rules" we are talking about have to do with the way the parties will conduct themselves during the process. For example, no name-calling, no interrupting, no yelling, the parties will remain seated, no threats etc. Here obviously the facilitator will need to bring the parties to a balance between on the one hand the need for free (including emotive) expression of experiences and on the other hand the need to protect and enhance the sense of security and integrity of each party. These guidelines provide added protection for the parties in the process as they make participation contingent upon certain behaviour. In addition, the very process of setting guidelines can offer the parties a feeling of empowerment as they name and come to agreement with one another about the terms of their participation. Being a part of the process of setting the ground rules also gives the parties more of a stake in following them. The participants feel more obligated to follow the rules because they are of their own making. The process of setting "ground rules" might also serve as a less complicated and relatively non-threatening place to begin the dialogue between the parties. Chupp suggests that setting guidelines is a crucial "part of establishing an atmosphere and stage that will be conducive to open communication and reconciliation."[107]

Outcome

Finally, we must address the outcome of the encounter process. Van Ness and Strong call this the "considering the future" or "plan for the future" stage of the process.[108] It involves what Chupp refers to as restitution[109] and what we have called reparation. Many speak of this stage as the culmination of the process. While the outcome is the result of the encounter (it is the plan to repair the harm done by the wrongdoing) it is misleading to suggest that this is the end of the restorative process. At the very least, the restorative process includes the time it takes to carry out the agreed upon terms and perhaps beyond.[110]

The agreement the parties arrive at must be the result of the restorative process. In other words, the agreement cannot be rushed. One must resist the temptation to view the agreement as the ultimate objective and, therefore, to rush the encounter (the establishment of what happened, sharing of stories and experiences). A truly restorative agreement relies on and reflects the encounter stage of the process. An understanding of what happened and of the harm experienced by the victim, is crucial to any attempt to address the harm.

Restorative agreements must also be arrived at in a manner consistent with the rest of the restorative process. They must be the product of listening to one another and of a genuine commitment to restore the relationship to one of equal dignity, concern and respect. For example, Chupp suggests that the perpetrator ought to be the first to propose what she might do to "make things right."[111] This is in keeping with the restorative justice commitment to empower the wrongdoer to accept responsibility and be accountable for her actions. It does so by giving the wrongdoer an active role in the process as opposed to the passive role currently assigned by the justice system. This proposal is also in line with the commitment to empower victims. They are placed at the center of the process and hold the power to respond to an offer with a counter offer or to explain why the proposal is insufficient.

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[107] *Chupp* at 63.

[108] *Strong* at 71.

[109] *Chupp* at 61.

[110] It may be unhelpful to even think in terms of a completion to the restorative process. Given that the aim of restorative justice is restoration of relationships to ones of social equality, restorative justice entails striking and *maintaining* a balance of social equality. Thus, in some sense the bid for justice, understood restoratively, is an ongoing process. However, this explanation may be too abstract to serve the needs of a justice system. What is important to bear in mind is that the aim of a restorative process is the restoration of relationship and this may take sometime after the end of the encounter between victim and perpetrator. A restorative justice process then involves a great deal more than the meeting between victim/perpetrator/community. From the pre-meeting, preceding assistance programmes aimed at recovery or rehabilitation where necessary to the execution of the agreement and the follow up and evaluation – a restorative process extends far beyond the encounter stage.

The proviso that these agreements are to be restorative in nature means it would be unacceptable to "buy off" the victim or bribe the victim with grand promises simply to come to an agreement. The aim of the agreement must be restoration not simply acceptance of the offer by the victim. Thus, the agreement must bear some relevant connection to the harm done.[112] The demand that agreements be restorative in nature also restricts what can and cannot be included. Often the claim that restorative justice is victim centered is misunderstood and taken to mean that the victim controls the process. At the outcome stage of the process this misconception translates into the claim that an agreement is restorative if it restores the victim. This begs the question: what will restore the victim? The response rests obviously with the victim herself. Under this conception, then, the victim holds all the cards. In order to successfully achieve restoration, the perpetrator must do whatever the victim needs or thinks she needs in order to be restored. But then the question is: what if the victim requires that the wrongdoer give her life – what if the victim requires vengeance in order to be restored? Surely the wrongdoer would be required to submit to this request. This scenario poses great difficulty for the restorative justice advocate. We have already argued against retributive justice on the grounds that justice cannot be achieved through vengeance. How then could the wrongdoer be required to give up her life in order to restore the victim in the name of restorative justice?

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[111] *Chupp* at 64.
[112] *Strong* at 94.

The answer to this paradox lies in the distinction between restorative justice as a victim-centered process and a victim controlled process. Restorative justice, we have argued, is victim centered. It places the victim and the harm she experiences at the centre of the process. This means that the victim and not the government, or the facilitator, or the community, is empowered to describe the harm she has experienced and what she requires by way of reparation. It does not mean, however, that the aim of restorative justice is to restore the victim (at least not solely the victim). As we have seen the aim of restorative justice is restoration of the relationship to one of social equality. It is through this restoration that the victim will be restored. The victim may require certain things in order to be able to stand with dignity and respect in relation to the wrongdoer. These needs, however, cannot include anything, which by its very nature is antithetical to restoration of relationship. One cannot talk about restoration of the victim in isolation. Thus, the agreement in a restorative justice process must aim to restore the relationship. The answer then to the victim who demands vengeance is that vengeance is not restorative, that vengeance will not and cannot address the inequalities which lead to the wrongdoing in the first place, and thus cannot bring about social equality.

This clearly means that punishment has no place in a restorative justice system. This is a claim, however, that warrants some more attention, because it does not enjoy consensus even among advocates of restorative justice. A closer look at punishment through a restorative lens reveals its impossibility within a restorative justice system. Bianchi is perhaps the strongest advocate of this position. Bianchi agrees with the restorative conception of justice we have articulated. As he describes it, "[d]oing justice signifies that people – victims as well as criminals, plaintiffs as well as defendants – will be set free from the consequences of conflicts, or rather that the consequences can be repaired as much as possible for all those engaged in the conflict." Justice understood restoratively cannot then be achieved through punishment because that would be, according to Bianchi, to do an injustice which "does not release people from their fears but makes things worse, pushing them into incompetence."[113] Justice, he concludes, cannot be achieved by means of counterviolence for violence breeds violence and not restoration. Further, punishment does not serve the interests of restoration because it does nothing to deal with the conflict. Punishment does not offer any resolution, instead it "creates a continuous feeling of uneasiness in the nation [and we would add in the victim and wrongdoer as well] because the conflicts are still blatantly there like sore wounds…"[114]

It is important to be clear that we do not intend by our rejection of punishment to rule out any agreement which might involve some sacrifice or cause the wrongdoer to suffer in some way or another. Repairing harm one has done to another is often a painful process. What we reject is the infliction of punishment – that which causes intentional harm or suffering. We reject this even if it is the case that such intentional infliction of pain might serve some greater purpose. Whatever other interests might be served, inflicting pain can not bring restoration, and cannot be the path to relationships of dignity based on equal concern and respect.[115] Thus, for example, while an agreement to work off the damage done by vandalism, or to repair the door frame broken by a burglary, or to repay a bad debt may require the wrongdoer to give up other activities, or sacrifice time, or even, in the case of restitution, entail monetary loss, such suffering is directly related to the harm. It is not intentional infliction of pain or suffering, it reflects a negotiated resolution to conflict. Restorative agreements repair harm, and, in so doing, release the perpetrator from guilt and responsibility for wrongdoing. These agreements may involve suffering but it will be suffering as a result of the wrongdoer's work to repair the harm to the victim as opposed to the inflicted suffering involved in punishment.[116]

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[113] *Bianchi* at 26.

[114] *Bianchi* at 27. He singles out imprisonment as particularly problematic in this regard. His conclusions are, however, easily extended to any mechanism which seeks punishment over resolution of conflict.

[115] In our view this would be the case even where victim and perpetrator agreed "voluntarily" that the perpetrator should suffer the infliction of pain as intrinsically restorative. This is because the infliction of pain for its own sake is always an expression of power over another and hence of inequality and therefore in inherent tension with the idea of restoration as restoration of social equality.

Evaluation

At the outset of this section, we argued that owing to the contextual nature of restorative justice it is not possible to articulate an archetype model against which to judge all others. We have, however, managed to draw out some of the constituent elements of restorative justice practice. The presence of these elements is necessary if a practice is to meet the demands of restorative justice. They cannot however, serve as a substitute archetype, as a restorative justice barometer. We repeat our initial caution that these elements are necessary but not necessarily sufficient for restorative justice.

This raises the issue of evaluation. If there is no single institutional model for restorative justice, and no comprehensive ingredient list is possible, how then are we to evaluate a process to see if it is a successful restorative justice one? Quite simply, a process must be measured by its ability to restore. That is to say there is no distinction to be made between a restorative process and a successful restorative process (between intention and results). Restorative justice is, as we have explained, by definition result oriented. Its aim is to restore relationships; its focus the harm resulting from conflict or wrongdoing. A well-intended restorative process, which does not actually restore is not a restorative process at all.

Thus, a restorative justice system must be evaluated by its results. As Van Ness and Strong point out, this evaluation will be significantly different from that of the current justice system. Where the current system evaluates justice done by the amount of punishment handed out a restorative system will measure the extent to which the interests of justice are served by the amount of harm repaired,[117] and by whether the relationship has been restored. As Bianchi instructs, "the act of justice is judged by its results, just as the tree is judged by its fruit. Here it is unimportant whether it be a lovely tree or a crooked one, a substantial, solidly constructed, and well-administered legal system or a flimsy one; the only concern should be whether it generates the results we expect."[118]

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[116] See generally Bianchi's discussion of the role of suffering in justice at 33.

[117] *Strong* at 41.

Summary

We have identified the constituent elements required of any practices if it is to serve the interests of restorative justice.

Restorative practices must:

- Involve all parties with a stake in the resolution of the conflict. The victim, perpetrator and community must each be involved and enabled to participate fully in the process.
- Recognize and seek to address the harms to one another, remembering that harm is not restricted to the victim but can be experienced by the wrongdoer and the community.
- Be voluntary. Participation cannot be the result of coercion, fear, threats or manipulation brought to bear on either the victim or the wrongdoer.
- Be premised on and include truth telling. Truth-telling in the form of an admission of responsibility for what happened on the part of the perpetrator is a precondition for a restorative process; truth-telling in the form of honest relating of one's story and experience by all parties is a fundamental part of the process.
- Involve encounter (face to face meeting and sharing of stories and experiences) between victim/wrongdoer and community.
- Protect the rights of victims and wrongdoers
- Involve a facilitator who can ensure the needed broader social perspective
- Aim for reintegration of victim and wrongdoer into the community
- Develop a plan for the future or agreement for resolution out of negotiation
- Not involve punishment
- Be evaluated by its results (whether it restores or not)

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[118] *Bianchi* at 19.

THE LIMITS OF RESTORATIVE JUSTICE: Promise, Possibility and Problems

In this section we turn to consider the scope of restorative justice. The language of restorative justice is common parlance with respect to the criminal law context. There has been much less attention however to the possibilities of restorative justice in other areas of law. We will then offer an examination of where restorative justice process might be possible and appropriate, for example, in the areas of civil, family, regulatory, labour and international law. Given that the overall ambition of this project is to provide a conceptual framework, which might serve as a foundation for future application of this model in various contexts, this examination will be of a limited nature. Our hope is to illuminate the possibilities for further study and application and to offer some direction for such explorations.

This section will also address some of the problems advocates of restorative justice might face in their attempts to employ this model. For example, we will consider how to deal with cases in which one or both of the parties is unwilling or unable to participate in the process. In particular, we will address the issues raised when a perpetrator is unable to participate in a restorative process owing to insanity or mental incapacity. This will include attention to how issues of social protection, raised for example in the case of so-called "dangerous offenders," ought to be addressed. Such an investigation will reveal the limits of restorative justice as it must be balanced with other social values.

Finally we will consider the challenge posed by cross-cultural situations where different communities with divergent ideas of what is required for restoration are involved.

Scope of Restorative Justice

That the development of restorative justice ideas has for the most part taken place with respect to the criminal law context is by now obvious. We have suggested that this may be at least partially explained by the tendency to define restorative justice through its opposite retributive justice represented by the current criminal justice system. There is, however, another possible explanation. Quite simply, it is perceived by many that our current criminal justice system is not working. Increased incarceration rates have had an inverse result from that intended – crime rates increase and recidivism is the norm not the exception. As Zehr suggested in his examination of retributive and restorative justice ,we ought to begin with what we know. And what is it that we know according to Zehr? "We know that the system we call "criminal justice" does not work. …We have known that for many years, and have tried many reforms, and they have not worked either."[119] What has been perceived as a crisis in the criminal justice system has prompted people to look for solutions. It has lead to reform and in some cases the more revolutionary move to question the very foundations of the current system – the move to restorative justice. Unfortunately, this revolutionary "re-visioning" of justice has remained focused on criminal justice. As a result restorative justice has come to be understood as an approach to criminal justice instead of as a new lens through which one ought to view justice generally.

Once one understands, however, that restorative justice is concerned with the restoration of relationships, it becomes impossible to justify limiting this approach only to those conflicts defined as criminal. In fact, the focus of restorative justice on harm and not law-breaking reveals the arbitrary nature of the distinction between public and private law in general. From a restorative perspective, what matters is the harm that results not whether the act which caused the harm is classed as a crime or not. Van Ness and Strong also question this distinction as viewed from a restorative perspective.

> But as the underlying harmful action is basically the same in criminal and tort cases, why are the two treated differently? The answer most often given is that while civil cases are concerned with the violation of individual rights, criminal cases are concerned with broader societal rights; criminal cases should not be initiated by victims, since vindication of public policy should not depend on an individual's decision to institute legal proceedings.[120]

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[119] *Zehr I* at 1/2.

[120] *Strong* at 46.

However, this common explanation makes it more difficult, not less, to justify the distinction given its origin. As we saw in our overview of the historical roots of restorative justice ideas, the decision to label some acts criminal was an eminently political one, driven by rulers' desires for greater political and economic power. It was for these reasons and not owing to some inherent difference in their very nature that certain acts were designated criminal. Once designated as such, these acts were treated differently. The replacement of the victim by the monarchy or state as prosecutor gave tangible expression to this otherwise arbitrary distinction. The state stole the victim's own conflict obscuring further the fact that these conflicts, like "civil" conflicts, were ones between individuals.

Given these origins, it is difficult if not impossible to offer a credible rationale for restricting restorative justice within the bounds of the criminal law. Indeed, if the relational approach of restorative justice is appropriate to the criminal context where the conflict between individuals has been so obscured, how could it not be appropriate to other areas of law where the relational dimension is obvious? In other words, in revealing the relational dimension of crime – as conflict between perpetrator and victim – restorative justice dissolves the distinction between criminal and other areas of law. By extension then, if restorative justice is applicable to the criminal law context it must be applicable to conflicts generally.

Restorative justice, then, is appropriate to contexts where harm has resulted from a conflict between parties. From this perspective the distinction between criminal and tort law (public and civil) disappears. We are not suggesting here that criminal law ought to end and simply be replaced by tort law where conflicts remain in the hands of the victim. Rather our claim is that once one changes to a restorative perspective on justice the divide between the two disappears. The concern becomes the harm resulting from the wrongdoing or conflict and the objective in both cases is restoration of social equality (repairing the harm). The way to accomplish this, however, may take cues from both systems, for example, the public funding and state support of the criminal law system, or the control and participation of the victim in the civil process, or the encounter aspects of the private tort system, etc.

Once the barrier between public and private is removed it is easy to see what has always been true – namely, that a restorative justice approach has much to offer to all areas of our legal system. Further, while much of the practical detail remains to be worked through, the theoretical work on restorative justice developed in the criminal context is transferable to other areas. There are, of course, examples that come to mind immediately that almost cry out for a restorative approach. We identify a few in the following section in the hopes that this might prompt others to explore the possibilities for restorative justice practices in their areas of expertise.

➔ Labour Law – There are multiple possibilities for restorative justice practices in the labour law context, most obviously with respect to individual employment disputes. Many such disputes, while concerned with the specific relationship between employee and employer, often involve or have implications for other employees, other employers in the industry, and often the wider community (as in the case of safety and standards concerns). Such disputes are sometimes submitted to a review panel or ombudsperson/mediator in a bid to keep it out of the courts. However, very often these processes are restricted to the immediate parties. As a result they are often plagued by power imbalances and further fail to take account of the wider context in which the conflict exists. A restorative process, on the other hand, makes room for these other communities to participate in the process. This participation serves to address issues of power imbalance and to ensure that all the issues involved are adequately addressed. There is a further benefit of using a restorative process in this context. When individual conflicts are dealt with on an individual basis isolated from the other communities with a stake in the issues at hand, the outcome is often of a limited scope. A restorative process, involving all the parties with a stake in the issues, holds the promise of a developing a plan for the future that can address general and systemic issues. A restorative approach then may reduce the number of individual disputes by involving other parties who could then take action to ensure that the conditions that lead to this particular conflict are addressed so as to prevent another incident of a similar nature. It is far from a guarantee that this will in fact be the result in all cases and on every issue. Nevertheless, a restorative approach makes room for this possibility where current individualist approaches do not. Even where members of interest communities do not participate in the plan for the future their presence at the process and the exposure to other perspectives may sensitize them to these same issues in their own contexts.

A restorative approach, as we have pointed out, also offers the advantage of allowing the parties to decide what is important to the resolution of their dispute and to be creative in designing that resolution. This would prove useful in the labour law context because many cases are the result of escalating tensions and can not be reduced to one particular act or incident. This is particularly true in the case of management/labour disputes where the issue is not between a particular individual over a particular incident but is one between employees and their employer more generally. Restorative justice processes can accommodate multiple issues and more complex resolutions.

➔ Family Law – Like the criminal justice system, the family law context has been the focus of substantial critique resulting in some innovations and reform. Most notably alternative dispute resolution (ADR) mechanisms have fallen into favor as a first step in the process of mediating most family conflict. We will examine ADR and the extent to which it meets the demands of restorative justice in more detail below. Here we simply want to highlight what restorative justice processes might have to offer in the context of family law. Owing to the intimate nature of many family conflicts, power imbalances are a major concern in this context. In fact, as we will see, one of the major criticisms levied against the use of ADR concerns the extent to which these less formal processes favour the powerful, hammering out agreements at the expense of the more vulnerable party. As feminist critics of the move away from the courts in family law point out, women are generally speaking in a less powerful bargaining position in such situations. Whether this is the result of their economic position, their care-taking role of children, or of a history of violence and the threat or fear of future violence, the fact remains that when women are required to negotiate with their spouses the results are often less than favourable for them. Further, power imbalances can cause women to feel victimized by the process itself. The involvement of communities of support called for in restorative justice, and, further, the participation of the community more generally with a stake in preventing such inequality might serve to mitigate against these power imbalances. Very often the presence of such support communities will empower the weaker party to represent her interests in the process. Their involvement also means that the resolution of the conflict is not only a matter for these two individuals, making it more difficult for one party to pressure the other into accepting a certain agreement. Further, the objective of restorative justice is the restoration of relationships to ones of social equality. This objective prohibits agreements made at the expense of one of the parties.

A restorative justice approach is also able to account for the important role of emotions in family disputes/conflicts, a role ignored by the court system. A judge of the Unified Family Court in Kingston Ontario refers to the phenomenon of "emotional tupperware" to describe the way this emotional dimension of family conflict finds its way into a system, which refuses to acknowledge its existence. Instead of expressing the emotional pain and suffering they have experienced, or seeking validation for their contribution to the relationship, parties latch onto material possessions as surrogates. The battle over the family cottage, a favorite painting or the silverware are often as much about emotional baggage as about the item itself. In a restorative justice process parties are able to identify the issues that are important to their particular conflict. They are given room, through telling their story and experience in their own words, to lay the emotional issues on the table. Further, the resolution negotiated by the parties is not limited to the distribution of material possessions. There exists within the process the possibility of addressing the real issues and harms involved in the breakdown of the relationship.

As we have already seen, restorative processes bring together all of the parties with a stake in the resolution of the conflict. This characteristic might prove particularly important in the family law context. Very often conflicts within families can not be neatly divided along individual axes; conflicts involving some members of the family naturally affect the other members. This is clearly the case with conflict involving parents of children. It is artificial to try and deal with issues pertaining to each in separate proceedings and yet the alternative of dealing with both issues together creates the danger in our current system that one will become an add on to the other more important issue. Restorative processes are founded on the recognition of the interconnectedness of individuals and their relationships. They take a holistic approach to conflict and its resolution.

➔ International Law – International law has an extremely broad focus, including everything from criminal law to trade regulation. To explore all the possibilities for restorative justice in this context would be to examine the whole of the legal terrain. Perhaps, then, it is worth lifting up one example where a restorative approach has been employed in the international context. Dealing with crimes against humanity and gross human rights abuses has been a challenge at the fore of the international scene at least since Nuremberg. The recent agreement struck in Rome to institute a new world criminal court rooted strongly in a retributivist conception of justice leads one to think that restorative justice ideas have had little influence in this area. However, an alternative to criminal trials has been developing during the past two decades – Truth Commissions. While these commissions have taken many forms with varied objectives, mandates, and powers, the recent embodiment in the South African Truth and Reconciliation Commission is evidence of its evolution to a serious alternative for dealing with past human rights abuses.[121] The South African Commission brings victims, perpetrators, and the South African community to the table in an effort to learn the truth about the past with a view to forging a way forward to a future founded on respect for human rights. The commission listens to the stories and experiences of those affected – victims, perpetrators and community. Perhaps more importantly through the work of the commission, people listen to each others' stories and gain an understanding of each others' experiences. Amnesty is offered to perpetrators who admit their responsibility and provide full disclosure concerning their acts. In this way perpetrators remain free to work towards restoration. Reparation is offered to victims in an attempt to address the harm they suffer.

The commission is not a perfect model for restorative justice. For example it has struggled to make a formal connection between victims and perpetrators in terms of amnesty and reparation. However, South Africa's model has paved the way for the truth commission as a viable and effective mechanism of restorative justice. Truth commissions stand in contrast to their retributive counterpart in criminal trials. Where criminal trials focus on individuals and their law breaking acts, truth commissions focus on restoring social equality by addressing the harm caused by conflict.

➔ Corporate Regulation –Braithwaite has suggested that restorative processes are effective tools in the corporate regulatory context. Specifically Braithwaite examines the possibilities for this approach in dealing with white-collar crime.[122] His analysis was driven by the common critique that the crimes of the powerful often go unpunished. He concludes that part of the reason for the almost chronic failure to prosecute corporate crime is that prosecution has little effect. Interestingly, however, Braithwaite noted that strategies aimed at regulation not retribution were producing the desired results. In his search for an explanation of these disparate results, Braithwaite identified the principal difference between these approaches as that between retributive and restorative justice. Regulatory programmes sought to address the harm caused by the act and develop a plan for the future aimed at avoiding a repeat occurrence. Further, the restorative approach involved all parties with a stake in the resolution of the conflict. In the corporate context this brought other companies in the same or similar industries and concerned citizens groups and advocacy groups into the process. As a result, the effect of the resolution agreed upon often reached far beyond the immediate perpetrator and victim to regulate practices throughout the industry.

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[121] See Generally: Jennifer Llewellyn and Robert Howse "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission" unpublished paper University of Toronto, Faculty of Law 1998; Jennifer Llewellyn "Justice for South Africa: Restorative Justice and the South African Truth and Reconciliation Commission" Christine M. Koggel ed., *Moral Issues in Global Perspectives* (Ontario: Broadview Press, 1998).

Challenges for Restorative Justice:

Is Restoration Possible Where One or More Parties is Absent?

An obvious question one must ask with respect to restorative justice is: what if one of the parties won't participate? This is where, we suggest, community plays its most important role in restoration. While it is important to restore the particular relationship in which the wrong occurred, sometimes this is not possible (immediately or ever). This does not mean, however, that nothing can be done. It is important to remember that while it is the relationship between the victim and the wrongdoer which is of primary importance, it is not the only relationship damaged by the wrong. Both the victim and the wrongdoer are members of a community and their relationship with the community was also damaged. Thus, the community can play a part in helping to bring victim and perpetrator back into the community from which they were isolated by the wrong.

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[122] See generally: J. Braithwaite, D. Gibson and T. Makkai "Regulatory Styles, Motivational Postures and Nursing Home Compliance" *Law and Policy* 16, 1994 at 363-94; John Braithwaite "Corporate Crime and Republican Criminologist Praxis" F. Pearce and L. Snider eds., *Corporate Crime: Ethics, Law and State* (Toronto: University of Toronto Press, 1995); John Braithwaite "The Nursing Home Industry" M Tonry and A.J. Reiss eds., *Beyond the Law: Crime in Complex Organizations, Crime and Justice: A Review of Research* (Chicago: University of Chicago Press, 1994); John Braithwaite *To Punish or Persuade: Enforcement of Coal Mine Safety* (Albany: State University

To be clear, then, the community can play two different roles in restoration. It can play "go between" or mediator, in cases where the parties are not able or ready to face one another. The community can also serve the interests of restoration to the extent possible where one party refuses to participate.

First, take the case where the parties are willing to work towards restoration in some sense but are not willing to face one another. The community could hold a process to discern with the victim her needs, and then with the perpetrator to see what might be appropriate from their perspective. Then the community would try and reflect with each party about the role and position of the other. This is not an ideal situation as actual encounter is very important for restorative justice. The two parties directly involved/affected by the wrongdoing need to meet one another face to face and learn to negotiate with one another. This is a key part of restoration. The community, then, should at every opportunity attempt to bring the parties together. However, before the parties are able or willing to come together, the community can do much to begin the process. It can work towards getting each party to contemplate what their needs and contributions might be in restoring the relationship. Further, the community can begin the work of restoring the parties' relationships with the community (remembering that the community has some responsibility for and was harmed by the wrongdoing as well). The community can ask what the victim might need and negotiate with the wrongdoer regarding how she might address the harm she has done to the community.

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of New York Press, 1985); John Braithwaite *Corporate Crime in the Pharmaceutical Industry* (London and Boston: Routledge & Kegan Paul, 1984).

The situation where one party refuses to participate is similar to that considered above where the parties cannot or will not meet one another. In both situations, the community plays an important role in working towards restoration. In the case where one party refuses to participate, the community could work towards restoration with the party who is willing. Often the most difficult case is where the wrongdoer is willing and the victim is not (it is also the case where we perhaps have the most sympathy for a party's reasons not to participate). It is important to develop a response to this situation such that the prospects of restoration cannot be highjacked by one party. Thus, while it would be ideal for the victim to be a part of the process, in the event that she refuses, representatives from the community, and even from the immediate community/group of which the victim is/was a part, might function in the place of the victim (e.g. group for victims of a particular crime, or a representative from the same neighbourhood where a robbery took place, or a member of the victim's religious, ethnic or racial group when a wrong involves the victim as a member of one of these groups). We have briefly addressed the option of victim-offender groups in our discussion of the role of community in restorative processes.[123] Victim-offender groups could serve a number of functions. One might have a group of victims meet with a particular offender (and her community of support) and attempt a restorative process involving these parties. Alternatively one might have groups of offenders meet with groups of victims (these individuals being unconnected but for involvement in the same kind of incident/conflict). Again this option is not ideal as it does not allow for restoration between the individuals directly connected with one another. It does provide, however, a chance for encounter with others from a different perspective. As such, it offers some of the benefits of encounter – namely, it gives parties the chance to tell their story and relay their experience in an context where they will be listened to with respect; it dispels stereotypes each group had of one another. In effect, it serves to humanize the other and the conflict.

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[123] See footnote 68.

The other alternative in a situation where the victim refuses to participate is to have the wrongdoer work to restore her relationship with the community while taking steps to try and open the door to restoration with the particular victim. Such restoration with the community might involve the victim-wrongdoer groups mentioned above, or other processes in which the community is given the opportunity to express the way in which it has suffered harm and wishes some redress from the wrongdoer.

Perhaps the easier case is where the wrongdoer is unwilling to participate in the process. There are two scenarios which might be played out here depending on the structure of which the restorative process is a part. This addresses a larger issue of whether restorative justice ought to be an alternative to the already existing retributive and corrective systems in a kind of dual system model, or whether it ought to replace the existing justice system. This is an issue we will return to in our consideration of the appropriate agents of restorative justice. For now it is safe to assume that initially restorative justice processes would have to operate in tandem with the existing system as it would not be practical or desirable to abandon the current system wholesale. Instead, change must be carefully planned and occur gradually. Thus, it is wise to consider the alternatives under both systems for the case where a victim refuses to participate in a restorative process – namely, in a dual system where restorative justice co-exists with the current justice system, and in a singular system where restorative justice processes comprise the entire justice system.

Before doing so it is worth considering further the question of voluntariness.[124] Why can the wrongdoer *not* be forced to participate in a restorative process? The answer to this question lies in the very nature of restorative justice. Restorative justice is inherently reintegrative. Because it aims to restore the relationship between the parties involved, the perpetrator must remain in the relationship. It is not possible, however, to *force* someone to remain in a relationship. The imposition of isolating measures on the wrongdoer can be avoided in order to keep the possibility of reintegration alive but no one can prevent an individual from withdrawing from relationship with others, from exercising "self-isolation." The concept of apology may serve as a useful analogy and reveal the logical impossibility of forcing someone to restore a relationship.[125]

The South African Truth and Reconciliation Commission faced this type of dilemma in deciding upon the requirements which must be met in order for an individual to gain amnesty for acts committed during the Apartheid era. One of the questions they faced was whether or not individuals would have to be sorry for their actions as a prerequisite for amnesty. Should applicants have to apologize to get amnesty? There were strong sentiments expressed in favour of requiring an apology. The idea that individuals need not show remorse for their actions, indeed that they might defend them and go free, would be too much for anyone to accept. In the end, however, this is exactly the reality of the amnesty provision as it does not make apology necessary. Even those most ardently opposed to amnesty had to see the wisdom in this decision. If amnesty was going to be offered at all it could not be made conditional upon an apology. Those responsible for setting up the Commission recognized the simple truth that a forced apology (which essentially would result if the only alternative was prosecution) is no apology at all. There is something in the nature of an apology, if it is to be meaningful and genuine, which requires that it be offered freely and out of a feeling of genuine remorse for what happened. Further, it must be accompanied by a commitment that such a thing will not happen again.

Restoring a relationship is of a similar nature. One cannot force an individual to restore a relationship. Relationships of equality require the willing participation and desire on the part of

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[124] See earlier discussion of voluntariness in "Theory" and "Rights Protection" sections.

[125] The role of apology and forgiveness in the restorative process is worthy of further exploration and research. See generally: Donald Shriver Jr. "An Ethic for Enemies: Forgiveness in Politics" (New York: Oxford University Press, 1995); Nicholas Tavuchis, "Mea Culpa: a sociology of apology and reconciliation" (Stanford, California: Stanford University Press, 1991).

both participants. Participation in a restorative process then must be voluntary if it is to have any real chance at genuine restoration.

Given the proviso that any restorative justice process must ensure that the parties enter into it freely and of their own accord, let us turn to consider the options available to deal with situations where a perpetrator refuses to participate in a restorative process under both a dual and single system model.

Since the dual system is the more feasible model, at least in the short term, we shall look at it first. The dual system model would have a restorative system co-exist with the current system. Thus, for example in the context of criminal law the offender would have a choice, to remain in the retributive system or to participate in a restorative process. An objection may be raised at the outset that such a model violates the voluntariness condition by forcing an individual to participate in a restorative process for fear of punishment in the retributive system.[126] We admit that this is a dilemma posed by the dual system. We ought to be concerned that individuals not choose a restorative process simply to avoid the retributive one,[127] that individuals might not be entering the restorative process out of a genuine commitment to restoration. However, this concern can be addressed by making the nature of restorative justice processes clear. Fear that the choice between retributive justice and restorative is no choice at all is, we submit, founded largely on the false perception that restorative justice is a soft option, that whereas retributive justice involves punishment, restorative justice lets the offender off. We have already argued against this perception of restorative justice. If offenders are made aware of the amount of time, effort and work a restorative process demands then the choice between the retributive system and a restorative one requires real consideration. We claim, however, that from the perspective of what will help a wrongdoer transform her life and address past wrongs, there is no comparison between retributive and restorative justice. Quite simply, restorative justice works where retributive justice does not. A wrongdoer's decision, if made on this basis ought not to cause concern with regards to voluntariness. If a wrongdoer is deciding between the two systems on the basis of which offers the best chance at transformation and redress this is already evidence of a commitment to restoration. Thus, the concern over voluntariness in a dual system structure is easily addressed through the provision of full and realistic information about the demands of each system. These considerations apply *grosso modo* to cases where the choice is between restoration and the conventional civil justice system.

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[126] See Robert Coates "Victim-Offender Reconciliation Programs in North America: An Assessment" J. Galaway and J. Hudson eds., *Criminal Justice, Restitution, and Reconciliation* (New York: Criminal Justice Press, 1990) at 128; Kim Pate "Victim-Young Offender Reconciliation As Alternative Measures Programs in Canada" Burt Galaway and Joe Hudson eds., *Criminal Justice, Restitution, and Reconciliation* (Monsey, New York: Criminal Justice Press, 1990) at 137-138.

[127] Wright notes this is one of the concerns expressed with regard to mediation programmes in Britain. See Martin Wright "Introduction" in Martin Wright and Burt Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Newbury Park: Sage Publications, 1989) at 10. (Hereinafter *Wright 2*) Note this same concern motivated our earlier consideration of rights protection within restorative processes. See "Rights Protection" section of this paper.

Suppose then a wrongdoer chooses not to participate[128] in a dual system restorative justice process. What then? The wrongdoer would remain in the current system, although a commitment to restorative justice would suggest that this choice could not be irreversible. While it seems, in order to avoid abuse, that there must be some cut off point beyond which one cannot avoid the outcome in the retributive or civil (corrective) justice system by switching to a restorative system, we must allow for the possibility that a wrongdoer may change her mind and decide that she is ready to try and achieve restoration. Along the same lines, there ought to be no restriction on wrongdoers participating in a restorative process even after they have been through the retributive or civil (corrective) justice system.[129] A commitment to restorative justice is an ongoing commitment to restored relationships; there is no time beyond which it is too late to attempt restoration.

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[128] One has to admit the possibility here that some individuals will not be capable of participating in a restorative process. However, caution is required in making this decision. One must resist the temptation to exclude individuals based on the nature of their wrongdoing. That is to say, one can not assume that some acts are so heinous that individuals who commit them are prima facie excluded from participating in a restorative justice process. It is important to understand that often it is those acts that violate relational ideal most that we think are so heinous their perpetrators cannot be a part of a restorative process. But this is illogical. Understood correctly, it is these acts which are most in need of restoration as they most clearly evidence the breakdown of social equality. In addition, Wright points out that generally it is these very situations in which the victim's needs are greatest and thus restorative justice would be more not less appropriate. (See: *Wright I* at 122) Torture is an example of one such act. People frequently argue that tortures cannot be dealt with through a restorative process. However, commitment to restorative justice means that this determination cannot be based on the nature of the act. Instead, we must look at the individual and her ability to participate, to understand her actions, take responsibility for them and work towards restoration. Some individuals may, after this examination, not be able to be a part of such a process i.e.: insane persons or those individuals with sociopathic disorders.

Deterrence, Social Protection, and the Limits of a Purely Restorative System

The single system poses a different challenge. In a single system model, restorative justice is the only option. How then does one deal with wrongdoers who refuse to restore since we know we cannot force them to be a part of this process? The alternative cannot be to let them off for that would be both unacceptable and potentially damaging to the cause of restoration. Clearly, there is still a need for specific deterrence. In the criminal context, the problem is how to do this without violating the very prohibition against punishment foundational to any restorative justice system. In some criminal situations, the answer is that individuals must be removed from society in the sense of being prevented from doing any further harm. But by doing so one cannot be fooled into thinking one is doing justice. Removing the individual is done in service of the value of social protection and not justice. However, this does not mean that in this situation the ambition of doing justice is simply forgotten or dismissed. Our aim must still be to do justice. This relationship between the values of restorative justice, deterrence and social protection warrants some further explanation. Ideally restorative justice processes will satisfy both values. However, as the situation of the unwilling wrongdoer reveals, this will not always be the case. Thus, one must determine what ought to happen in the event these values conflict with one another. Wright's concept of a "limiting factor" is useful in this regard. Wright claims that to avoid contradictions a restorative justice system ought to have one primary aim. This does not mean, according to Wright, that such a system cannot seek to achieve some other goals. These other ambitions, however, must be secondary to the main aim. Wright labels these as subsidiary aims and explains that, "[a] subsidiary aim is one which is desirable, but is subordinate to the primary aim if the two are incompatible."[130] For example, we have identified the primary aim of restorative justice processes as the restoration of relationships to ones of social equality. A subsidiary aim might be general deterrence.[131] General deterrence would be pursued only so long as it was compatible with restoration. Wright suggests that in addition to subsidiary aims there are limiting factors, "operating conditions which must not be overstepped" as one pursues the primary aim.[132] Limiting factors act in effect as checks on the primary aim. We submit that social protection acts precisely as such a limiting factor on restorative justice. The value of social protection does not trump restoration. Rather, it serves to limit the ways in which such restoration can be achieved. Restoration remains our primary objective, and we should always seek to fulfill that aim however, it cannot be sought at the expense of social protection. Whatever the resolution or outcome of a restorative process, it cannot be such that it threatens the general safety of society.

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[129] This is in fact the only point at which offenders are eligible to participate in some restorative justice programmes. See generally: Umbreit's discussion of the Genesee Project in Mark Umbreit "Violent offenders and their victims" Martin Wright and Burt Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Newbury Park: Sage Publications, 1989) at 99. However, one of the dangers of leaving restorative processes to this stage is that the adversarial nature of the current justice system may pull the parties in conflict further apart making restoration harder to achieve. See: *Chupp* at 66. Wright suggests that one of the ways in which the adversarial system may have this effect is through necessitating a "winner" and a "loser." Often this official intervention drives the parties further apart. In contrast, restorative outcomes are the result of negotiation between the parties and thus allow for a "win/win" resolution. *Wright I* at 112.

Conversely, this requires that even in cases where it is not immediately or obviously possible to bring an individual into a restorative process, where individuals must be denied their freedom in the interest of social protection we should always seek to achieve the primary aim of restoration. This will affect the way in which social protection is carried out. It means that the door is never closed on the possibility of restorative justice. In practical terms it requires that in all that we do, including for example incarceration for social protection, we must work to bring the perpetrator and victim into a restorative process. As Van Ness and Strong maintain "[a]ny social controls imposed on the offender should not unnecessarily obstruct the determining goal of restoration."[133] Thus, in the case of the wrongdoer who must be imprisoned in the interests of social protection, such imprisonment must be of an entirely different nature from what it is today; such processes must be designed with the aim of helping the perpetrator get to the point where she is able to participate in a restorative process rather than exist for the purpose of punishment. Thus, imprisonment would involve education, training programmes, therapy, in short, whatever is required for the individual to understand the need to restore relationships and be willing and able to do so.

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[130] *Wright 1* at 114.

[131] In his discussion of the issue Wright prefers the term general incentive because deterrence suggests example by fear and punishment. General incentive would result from the involvement of society and their commitment to protect relationships of social equality. *Wright 1* at 115.

[132] *Wright 1* at 114.

There may of course be situations in which bringing the wrongdoer into a restorative process is not possible. Of course there will be some concern about what happens to those who never reach the stage where they are willing to participate. Are they to be kept from free participation in society forever? This is a difficult question to answer. It will certainly depend on the reasons why the individual is not participating in the process. If the reason is she is not mentally/psychologically able to participate, then the appropriate response would be treatment and long term care in an environment where the individual can live life fully but without harming others' rights to do likewise. If the reason for not participating is that the perpetrator is not willing, this raises a serious question about the kind of further damage such an individual would do if permitted. It is in the interests of society to protect relationships from further damage by such individuals. The concern this raises for the rights of the wrongdoer are lessened perhaps by the fact that the individuals are not being subjected to punishment. That is to say, as much as is possible, they are not being denied the right to live a full life.

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[133] *Strong* at 51.

Finally, we must not forget the challenge of restoration in circumstances where the wrongdoer or victim are not present for reasons other than a refusal to participate. Consider for example the issue of whether there is a responsibility of younger generations of Germans towards victims of the Holocaust, and indeed their families. Such cases prove almost insoluble for conventional theories of justice with their exclusive bipolar focus and narrow conceptions of agency. Under a restorative justice approach, we need not characterize the younger generations as somehow "guilty" or "perpetrators" in order to acknowledge that they may have a distinctive need for restoration, a need that relates to *their* need to be able to love and to honour as parents, grandparents, etc. those implicated in these horrific wrongs. In other words, a restorative process may not only be possible but necessary where the actual "perpetrators" under a conventional theory of agency, are no longer present. But it will be shaped rather differently, because of the needs of those present, who must now be restored to a relationship of equality in society. Conversely, the families of victims will have restorative needs, but these will not be identical to those of the "primary" victims, if they were present.

Whose Idea of Restoration?

Another limitation restorative justice approaches might face is in dealing with cross-cultural situations where decidedly different ideas of what is required for restoration prevail. Can a restorative justice process work if the parties involved have different conceptions of restoration? Whose idea should prevail? Say, for example, the conflict occurs within a aboriginal community. A restorative process might seem appropriate in this situation as the community shares a common sense of what is required for relationships of social equality to exist. However, what if one of the parties is not aboriginal? To complicate the matter, suppose the other party comes as a member of a culture with its own distinctive ideas about how social equality is to be achieved. Are the prospects of a successful restorative justice process lessened in the absence of a shared understanding of restoration?

The answer we suggest ought to be a confident no, restorative justice process are not contingent upon a shared cultural conception of restoration. In fact, restorative justice processes may serve as a mechanism to discuss different ideas of restoration and come to some compromise appropriate to the particular context in question. The resolution sought in a restorative justice process must be the product of negotiation between the parties with a stake in the matter. By definition then what is needed to restore the relationship cannot be dictated by one party for this would exclude the other party from the process. It is helpful at this stage to remind that the goal is not restoration of one party or the other but rather the restoration of the relationship between these parties. It is clear, given this objective, that any agreement cannot be achieved at the expense of either party. Rather it must be the product of negotiation between them, and there must be assurance that no further harm will result from the agreement. As we have indicated this negotiation is itself an important step towards restoration of the relationship. Thus, in the context of a cross cultural conflict, restorative justice requires that no single idea of restoration be imposed but rather that both be brought to the table and discussed in order to find the appropriate compromise for resolution of the particular situation at issue.

Admittedly, this may not be as easy as it sounds. Indeed, negotiation is often a more difficult process than that of imposing a settlement. However, it is worthy of the effort given that negotiated resolutions tend to last. The very processes through which parties are to negotiate a resolution may be at issue between two groups. This case may require the different communities to come together to agree upon the details of the restorative process before such a process begins. The meeting itself between the groups should of course be run in the spirit of restorative process.

Another point in favour of restorative justice processes in cases of cross-cultural context needs to be made. As some of the respondents to a recent survey on restorative justice by the New Zealand Department of Justice maintain, restorative justice may in fact address cultural differences better than other practices because it makes room within the process for different cultural expressions.[134] We have argued that one of the strengths of restorative justice mechanisms is their open texture. Restorative processes allow the participants to express their experiences from their own perspectives and to decide for themselves what is important to resolving the conflict. There are no presumptions made regarding the nature of the conflict and the resolution that would exclude some cultural expressions and not others. In the bid to restore social equality, restorative processes must open the door for social dialogue about how such equality is best achieved. The dialogical nature of restorative processes makes room for the expression of different perspectives in working towards restoration.

CURRENT PROGRAMS

Restorative justice has caught the attention of many reformers. In a short period of time restorative justice has become a new catch phrase for alternatives to traditional legal practice. At the outset of this project we identified the need for a conceptual framework in order to distinguish between truly restorative practices and other practices that simply look different in form from current ones. It will be clear by now that restorative justice not only looks different from the traditional adversarial system (a courtroom with two lawyers and a judge), it is rooted in a fundamentally different understanding of justice - an understanding of justice as the restoration of relationships of social equality. However, the label restorative justice continues to be liberally applied to alternative practices seeking legitimacy. If the cause of restorative justice is to be advanced, it is important to be clear about what qualifies as restorative justice and what does not, to distinguish restorative justice as something more than alternative practice.

The work of evaluating practices which hold themselves out to be restorative in nature must be undertaken on a case by case basis, requiring careful attention to the structure of the practice and the context in which it operates. Further, such evaluation must be ongoing for as contexts change so too must practices aimed at restoration. Evaluation of existing programmes holding themselves out as restorative is beyond the scope of our current project. It is important before moving on, however, to offer some sense of how such evaluation might be carried out – to understand how restorative justice might differ from the many alternatives to traditional legal practice. To this end a brief examination of the relationship between restorative justice and alternative dispute resolution (ADR) might prove instructive.

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[134] *Restorative Justice: The Public Submissions* (Wellington New Zealand: Ministry of Justice, 1998) for copies contact: Ministry of Justice, P.O. Box 180 Wellington, New Zealand.

Our aim here is not to offer a comprehensive description or examination of ADR or to pass judgement on the effectiveness or utility of such initiatives. Rather, we are only interested in the relationship between restorative justice and ADR – that is with the extent to which ADR might be viewed as restorative justice. ADR is an obvious candidate for our investigations as it is understood to refer to all practices outside the traditional legal processes. Restorative justice is often mistaken to refer to these same practices. Understanding the ways in which ADR reflects restorative values, and how it fails to meet the demands of restorative justice will provide much guidance for the evaluation of other practices.

Freeman maintains that "[t]here is no generally accepted abstract or theoretical definition of ADR as such."[135] Tannis explains it as a "social phenomenon" or as a "movement."[136] While there have been moves afoot over the past few decades to move disputes outside the physical space of a courtroom (arbitration and tribunals), ADR as a movement aimed at looking for other forms of dispute settlement did not really take hold until the 1980's.[137] It is often suggested that this movement was the result of dissatisfactions with existing practices on a number of fronts including "the cost (time and money spent to resolve the dispute); the incomprehensibility of the process (issues related to the lack of participation of the affected parties); and the results (issues related to the imposition of a "remedy" by a "stranger" from a predetermined limited range of win/loss or "zero-sum" options)."[138] However, while the movement towards alternative dispute resolution might have been prompted by such dissatisfactions with traditional methods of adjudication, it would be a mistake, Freeman cautions, to assume the existence of a radical division between traditional adjudication and ADR. It is too easy, he claims, to paint a picture of ADR and adjudication as inhabiting "distinct and discrete normative worlds." Rather, a true picture would portray the reality that, more often than not, ADR is "not located in institutions that operate independently of the norms and sanctions of the legal system. Instead, ADR is typically situated near legal institutions and dependent upon legal norms and sanctions."[139] Lover and Pirie suggest that rather than seeing ADR as the resolution of disputes outside of the courts, a better view would be that "alternative dispute resolution is a concept that encourages people or organizations involved with disputants to look closely at all alternatives or options that may be available to help resolve the problem."[140] As such ADR includes resolution of disputes through resort to traditional adjudication.[141] Some have suggested it is better to understand ADR as a term covering a continuum of practices ranging from informal negotiation to traditional formal litigation.[142] A recent primer on alternative dispute resolution produced for the Ontario Government identified any one or a combination of the following under the umbrella of ADR: negotiation, conciliation, mediation, early neutral evaluation, mini-trial, summary jury trial,

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[135] Michael Freeman "Introduction" Michael Freeman ed., *Alternative Dispute Resolution: The International Library of Essays in Law and Legal Theory* (New York: New York University Press, 1995.) at xi. (Hereinafter: *Freeman*)

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[136] Ernest Tannis *Alternative Dispute Resolution That Works!* (Toronto: Captus Press, 1989).
[137] *Freeman* at xi.
[138] George W. Adams and Naomi L. Bussin "Alternative Dispute Resolution and Canadian Courts: A Time for Change" *Advocates' Quarterly* 17:2 (May 1995) at 142.
[139] Galanter as quoted in *Freeman* at xi.
[140] John Lover and Andrew Pirie *Alternative Dispute Resolution for the Community: An Annotated Bibliography* (Victoria: Uvic Institute for Dispute Resolution, 1990) at vii. (Hereinafter: *Lover and Pirie*)
[141] Kanowitz reminder that "the judicial system itself is an alternative dispute resolution mechanism – an alternative to self-help, to force, to violence, to anarchy" might prove helpful in understanding the claim the courts ought to be included in our conception of ADR. Leo Kanowitz *Alternative Dispute Resolution: Cases and Materials* (Minnesota: West Publishing Company, 1985).
[142] *Lover and Pirie* at vii.

mediation/arbitration, arbitration.[143] These initiatives can vary depending on whether they are voluntary or not,[144] whether the agreement arrived at is imposed or negotiated, and upon the range of "remedies" or options available for resolution of the dispute.

This brief description of ADR makes obvious what is problematic with claims that ADR is restorative justice. The move to ADR is motivated by some of the same values as restorative justice. Indeed, ADR as the "search for a more consensual approach to problem solving, more accessible and community-oriented forms of dispute resolution… [for] a process that generates 'win/win' rather than 'win/lose' or zero sum results,"[145] shares much with restorative justice. Because ADR is such a broad concept referring to practically any strategy used to resolve disputes, restorative justice practices could easily fall under this title. This is beside the point however as our concern is with the claim that ADR is restorative justice. However, while restorative justice initiatives might be included under the umbrella term ADR, the reverse is not also true. The move to ADR does not necessitate a move away from the conception of justice underlying traditional practices. In fact, many of the practices included under the ADR rubric are rooted in the same retributive conception of justice as traditional court processes. Particularly telling is the fact that the descriptions of ADR mechanisms focus exclusively on dealing with the opposing parties involved in the conflict. While any recognition of the victim's role in the resolution of their disputes is certainly an improvement over traditional litigation, this recognition is not enough from the perspective of restorative justice, as it fails to understand the social nature of conflict. In other words ADR does not question the basic understanding of disputes as isolated incidents limited to the individualistic level. Rather, ADR works to find other ways to do justice as conceived of by the existing system.

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[143] Carolyn Stobo *An Alternative Dispute Resolution Primer and Survey of Current Government Initiatives in Ontario: Current Issue Paper 165* (Toronto: Ontario Legislative Research Service, 1995) at 2/3. (Hereinafter: *Stobo*)

[144] Court-annexed ADR is a concept currently receiving a great deal of attention. Stobo describes it as "when one or more processes such as mediation, early neutral evaluation, mimi-trials and arbitration are incorporated directly into the court process." She explains that "[i]n those cases where alternative processes may be more suitable to the resolution of a dispute, court-annexed ADR would permit the parties to pursue these processes voluntarily or, in the absence of the parties' agreement, they could be required to pursue them by a court order prior to taking any further steps in an action or proceeding." *Stobo* at 4.

What this highlights is the need to evaluate processes by their outcome (whether they restore or not) rather than by the extent to which they differ from existing practices. However, it is important not to ignore the efforts made to move towards restoration that do not constitute a restorative process. Many of the initiatives taken in the name of ADR may not meet the demands of restorative justice, but it would be shortsighted not to recognize the contributions such initiatives make to the overall ambition of achieving restoration. Many recognize that changing systems is a slow and gradual process. In view of this reality they work within the bounds of the existing system to make it less harmful to the interests of restoration.[146] Included here are the many attempts at sentencing reform, diversion programs, victim impact statements, community service as alternative to incarceration etc. A close analysis of these practices will find them lacking many of the elements we have identified as necessary for restorative justice. Such an evaluation is key for the development of truly restorative practices. However, it ought not to discourage advocates from trying to better current practices while we await restorative ones. It is not wrong from a restorative perspective to attempt to make things less retributive. What would be wrong, in that it would inhibit the development of restorative practices, would be to think that the problems with the current system can be addressed by changing a few practices, that real change is possible without questioning more deeply the idea of justice at the root of such practices.[147]

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[145] D. Paul Emond "Alternative Dispute Resolution: A Conceptual Overview" Paul Emond ed., *Commercial Dispute Resolution: Alternative to Litigation* (Aurora: Canada Law Book Inc., 1989) at 4.

[146] Given the contrasts and conflicts between retributive and restorative conceptions of justice, it is not possible that retributive practices can be made restorative. It is possible, however, to protect the harmful effects of the retributive system such that restoration remains an option.

[147] This is what sentencing circles do. While they have been looked to recently as a means of addressing problems with the ineffectiveness of western justice in aboriginal communities, viewing them as alternative practices misses why they work. They work because they are rooted in a different conception of justice. So it is not enough to examine the practice – it is the process of which it is a part that is important for whether it meets the demands of restorative justice.

AGENTS OF RESTORATIVE JUSTICE

"Ultimately, whole new institutional structures are likely to emerge from the restorative justice approach."[148]

In this final section we will turn to perhaps one of the most practical concerns: how to go about *doing* restorative justice within our current justice system. We agree with Van Ness and Strong that restorative justice as a normative perspective will ultimately require substantial reform of the current justice system; it is clear that immediate whole-scale reform is neither possible nor desirable. Rather, change must occur gradually so as to avoid losing the baby with the bathwater. There is little question, given the dissatisfaction and problems with the existing system, that we need new institutions. However, these new institutions must *emerge* from questioning and work with the current practice. Thus, we need to move forward with the understanding of restorative justice in hand, and inquire how the work of restorative justice might be done now in and with our current system. This work will provide the foundation for more radical change in the future.

Detailed consideration of how and where restorative practices might be developed and utilized is clearly the agenda for the future. As this paper is intended to provide a conceptual framework that might serve as a starting point for such work, we will not attempt such detailed analysis. There remain, however, a few important points which warrant consideration before one attempts to develop restorative practices within or along side the current justice system.

In this section we will explore some of the challenges of working for restorative justice within a dual system. We will consider the role of government and community as agents of restorative justice. Finally, we will address the process through which restorative practices ought to be developed.

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[148] *Strong* at 45.

Restorative justice within a dual system

The reality that restorative justice practices will (at least initially) exist within or along side the current judicial system warrants some consideration of this relationship. Zehr has suggested that such an arrangement, particularly with regard to the criminal justice system, ought to be the cause of some concern and caution on the part of advocates of restorative justice. Specifically, he offers three reasons why restorative justice projects might not achieve their objectives if run in conjunction with the existing criminal justice system. In looking forward to the implementation of a restorative vision of justice, we would do well to bear such cautions in mind with a view to designing a dual system that can accommodate the aspirations of restorative justice.[149]

Zehr's cautions are directed specifically at the criminal justice system. However, we have already suggested that in many ways the concerns raised with respect to the criminal justice system are generally appropriate to the rest of the existing justice system. This is particularly so regarding concerns with the retributive nature of the criminal justice system, as the rest of the justice system shares these retributive characteristics whether it be through punitive awards in civil cases or simply the adversarial nature of the system as a whole. Zehr contends, then, that attempting restorative justice from within the existing system could prove dangerous to the goal of restoration owing to these factors:

1) the criminal justice system is by nature retributive and not restorative
2) the criminal system is oriented to offenders and not victims
3) when challenged, the instinct of the criminal system is towards self-preservation[150]

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[149] The idea that the justice system might exist as a dual system either in the transition phrase to a fully restorative system or as a more permanent arrangement is not without some existing inspiration. The Japanese example might offer some guidance for the development of a two track system. See generally: John O. Haley "Confession, Repentance and Absolution" in Martin Wright and Burt Galaway eds. *Mediation in Criminal Justice* (London: Sage Publications 1989) 195; Daniel H. Foote "The Benevolent Paternalism of Japanese Criminal Justice" Cal L. Rev. 80 (1992): 317; Strong at 60. Also worthy of note is the old Federal Republic of Germany system (similar to the Japanese approach) in which a court order is deemed unnecessary where reparation is made. The Austrian model is also of interest in which if reparation where made before the police were notified of the offence then no offence will be deemed to have occurred. See: *Wright I* at 119.

We have already alluded to the difficulties these characteristics of the current justice system might pose for integrating a restorative approach.[151] However, it is important to give some further attention to these challenges as we consider the possibility of finding a home for restorative justice within the context of our existing justice system. Like Zehr, Wright is also cautious in his approach towards restorative justice practices in a dual system.[152] He is similarly concerned that the very aims, ambitions and structure of the current justice system might co-opt restorative justice and frustrate the goal of restoration.

In order to address these concerns, it must be clear that a dual system – one where restorative practices might co-exist in some way with existing practices – cannot mean simply adding restorative justice alternatives to the current system. In other words, it is not possible to meet the needs of restorative justice by merely "adding on" restorative practices to existing ones. Rather, the two systems must be connected and adjusted such that co-existence and co-operation are possible. A dual system will require changes to the current system as experiments with alternative practices offer evidence of what works. As Zehr has suggested, being open and accepting of change is not a notable characteristic of the existing justice system. As a result the development of a dual system – one which truly makes room for a restorative approach – may prove a difficult task. The example of the reception of victim-offender reconciliation programs in Ontario highlights the resistance of existing systems to change.

The Victim/Offender Reconciliation Program (VORP) initiated in Kitchener Ontario in 1974 (often referred to as the "Kitchener experiment") is generally credited with being the first program of its kind. As such it stands as one of the first restorative oriented approaches to crime. The program enjoyed significant success during its several years in operation. Judges were referring increasing numbers of cases to the program in order that offenders and victims could

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[150] *Zehr 2* at 233-235; and see discussion of Zehr's claims in *Strong* at 59.
[151] In particular see the discussion of retributive vs. restorative justice at 28.

meet and decide upon the appropriate remedy to address the harm the offender caused the victim. However, a 1982 decision by the Ontario Court of Appeal resulted in a massive drop off in referrals to the program. In the case of *R. v. Hudson*[153] a convicted man appealed a restitution order on the grounds that circumstances made it too onerous for him to fulfill the terms of the order. While it was not at issue in the case, the trial judge in his oral judgement went further than simply reversing or altering the restitution order in the case at bar. He concluded that the way in which the restitution order was determined was itself improper. Specifically, the court held that allowing the determination of restitution to be made through VORP programs was an improper delegation of a judge's sentencing authority. This decision had serious implications for the Kitchener program. While it was possible to get around this technical difficulty by bringing the results of the VORP processes back into court to be pronounced upon by a judge, such steps discouraged judges from using the program by sufficiently complicating and lengthening an already drawn out process. This serves as an example of a situation where the existing system might have changed its procedures in order to allow for new and effective practices. Instead, however, the system opted for self-preservation, maintaining its monopoly over dealing with criminal behaviour.[154]

This is not to suggest that the existing system has been completely non-receptive to change. For example, the 1985 Young Offenders Legislation showed some movement towards encouraging alternative sentencing.[155] In fact, Kim Pate notes that "[d]iversion programs for

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[152] *Wright 2* at 12.

[153] *R. v. Hudson*, O.C.A. Oral Judgement, January 7, 1982.

[154] It is worth noting that a 1984 Reform Package to Federal Legislation proposed changes to the Criminal Code which would have permitted judges to delegate their powers to VORP and similar programs. This package of changes however was never passed.

[155] While this legislation is currently undergoing revisions the recent *Strategy for the Renewal of Youth Justice* released by the Federal Department of Justice suggests that support for alternative sentencing and diversion programs will continue. *A Strategy for the Renewal of Youth Justice* (Ottawa: Department of Justice, 1998). See generally: K. Pate and D. Peachey "Face to Face: Victim-Offender mediation under the Young Offenders Act" J. Hudson, J. Hornick and B. Burrows eds., *Justice and the Young Offender in Canada* (Toronto: Wall and Thompson, 1988).

youth that include victim involvement as a core component have developed in every province of Canada, as well as in the Northwest Territories.[156]

In addition to the general resistance of the existing system to change, there are other concerns the dual system idea raises for restorative justice advocates. One which we have already addressed is the issue of voluntariness. The worry here is that fear of punishment in the retributive system, and not a genuine commitment to restoration, would prompt the participation of perpetrators in restorative processes. While this is certainly a possibility, one ought to be mindful that it is possible to address this concern by providing realistic and proper information about the nature of the restorative system so as to dispel the idea of it as a soft option.

There is also, of course, the issue of consistency when two systems attempt to operate in tandem. Wright claims that:

> It would be possible, as an interim phase, to operate it [restorative system] while courts still followed a retributive philosophy, although that would inevitably lead to contradictions. This has been found in some of the experimental projects operating within the existing system, where sentences on contrite offenders have included a conditional discharge for attempted murder (admittedly in exceptional circumstances) and a custodial sentence for two burglaries.[157]

While such contradictions might well be of concern within a dual system, some variation between agreements is inevitable, and, indeed, desirable in a restorative system given its contextual approach to resolving conflict. A restorative approach seeks a response specific to the situation at hand. It seeks to avoid arbitrariness linking the resolution to the details of the situation. The retributive system, on the other hand, addresses the arbitrariness concern by ignoring context, assigning the same punishment for the same type of act. That there would be contradictions, then, when the two approaches co-exist, is hardly surprising. However, one might be comforted by the fact that in choosing the restorative system individuals would be aware that the outcome would be context specific (and thus difficult to predict at the outset).

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[156] Kim Pate "Victim-Offender Reconciliation as Alternative Measures Programs in Canada" B. Galaway and J. Hudson eds., *Criminal Justice, Restitution, and Reconciliation* (New York: Criminal Justice Press, 1990) at 135.
[157] *Wright I* at 124.

This last point raises one final concern for restorative justice within a dual system approach. The concern relates to the matter of gatekeeping between the two systems. It is raised by the question of who decides which case belongs to which system, and what criteria will be applied. One should remember Zehr's caution that the existing system has a propensity toward self-preservation when challenged. Given this propensity, there is a danger that the current system could corrupt a restorative system if it holds the power to decide which cases to refer to the alternative (restorative) system.[158]

Perhaps this concern is rooted in a more general worry that in a dual system restorative justice will always be understood as the alternative to the status quo. As such, a restorative justice system would in some real sense be at the mercy of the pre-existing system, being offered the castoffs from the current justice system. This might result, for example, in only those cases which might otherwise have been candidates for discharge or probation being referred to the restorative system. This would create a "netwidening" situation. Rather than keeping cases out of the justice system, it would serve to keep cases in the system which otherwise would have been dismissed. In this sense, restorative justice systems would serve to increase the number of individuals caught in the justice system. This problem could be avoided, however, by ensuring that the choice to participate in a restorative justice system is always left to the individual accused[159] and further that everyone has that choice.

State and Community as Agents of Restorative Justice

As we saw in our brief look at the roots of restorative justice ideas, they owe much to community driven initiatives and to the "informal justice" movement generally. As an alternative to the current government centered and operated system, it is not surprising that the development of restorative programs has come from the community and not as the result (at least initially) of government action. The community driven nature of restorative justice is perhaps necessary and appropriate given the importance of the community, and the need for contextual responses to conflicts. However, while it is clearly important and desirable for communities to play a key and even leading role in restorative justice programs, does this exclude government from having any role as agents of restorative justice?

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[158] *Wright 2* at 10.
[159] *Wright 2* at 10.

Our description of a dual system suggests the answer to this query must be no; government can not be excluded entirely as agents of restorative justice. A commitment to restorative justice requires a commitment from government to be open to and facilitate change in the current system in order to make a dual system workable. Furthermore, to exclude government would be to lose the expertise and resources government involvement brings. Thus, an either or solution is not the answer. Restorative justice is not solely the business of government or community. Rather, is best served through cooperation, with the two working together to use their resources and skills to the best of their ability.

The contextual nature of restorative justice makes community involvement an imperative. The community is in touch with, aware of, and most able to grasp the context. The community is able to mediate between micro and macro level concerns, and thus able to be flexible in designing an appropriate response to a conflict. However, communities can not do this (at least as effectively) without government assistance. Governments can provide resources to ensure that all communities regardless of their economic situation are able to adequately attend to conflicts. Remember the desire to ensure that justice not be determined by one's ability to pay, which was a motivating factor in the move to a government centered system of justice in the first place. While government involvement has had disastrous implications for the role of victims, it has, nevertheless, ensured that justice will not be contingent upon the means of the victim to prosecute.

Further, as we suggested in our discussion of the protection of rights, in restorative processes some monitoring of individual processes is required. The government is in a prime position to play a role in ensuring rights are protected in the various processes. Government involvement could also be key in ensuring that some standards are met with respect to restorative processes, that processes calling themselves restorative do indeed serve the interests of restorative justice, that they include the necessary elements of restorative justice.

Developing Restorative Processes

Perhaps the most important point that must be made with respect to who ought to be agents of these processes is that the development and operation of restorative processes must be consistent with the principles of restorative justice. Thus, in looking forward to the development of restorative processes attention must be paid to who is involved in and responsible for such development. Just as restorative processes themselves ought to involve all those with a stake in the matter, so too should these individuals and groups be involved in the development of restorative justice processes. This demands that perpetrators, victims/victims groups, representatives of the various communities, government officials, etc. not simply be involved in the processes, but in the development and design of these processes as well. That processes and projects aimed at restorative justice be developed in ways which reflect the underlying values of restorative justice (participation, encounter, etc.), is key both to their success and to the overall project of restoration. Developing restorative justice initiatives in a restorative way actually works towards restoration. Further, including the different parties in the process is necessary for the success of restorative processes. It means that parties will be committed to the process because they had some part in its design. Restorative processes cannot simply be foisted upon people and be expected to work. Parties need to gain an understanding of the aims and demands of restoration and have some say in what is required to achieve it in their context.

Enabling participation in the development and operating of processes and programs will require a broad commitment to education. It is not enough simply to make room for involvement in restorative justice initiatives. Individuals must be equipped for participation. Existing and learning in a society so centrally focused on retribution and adversarial methods of conflict resolution, there is little opportunity for individuals to gain a different perspective on conflict or its resolution. The success of restorative justice programs and processes depends on the participants' commitment to restoration, and their willingness to work towards that goal. This commitment can only develop as a result of education and dialogue.

Finally, it is important to acknowledge the dynamic nature of restorative justice processes. Owing to the contextual nature of restorative justice programs, the processes must be subject to ongoing evaluation and constantly open to change and challenge.[160] This is another reason why general education and equipping of citizens are required in any effort aimed at restorative justice. Working towards restorative justice must be an ongoing process open to all.

CONCLUSION: The Road to Restorative Justice – Getting from Here to There

It will be obvious from our elaboration of a conceptual framework for restorative justice that realizing the full aspirations of this ideal entails enormous issues of institutional reconstruction and redesign. In this conclusion, we can do little more than articulate what we consider the research, and policy development, agenda that flows most immediately from the possibilities opened up by the restorative idea.

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[160] Peachey advocates the use of the word project with respect to restorative justice initiatives in the hopes that it will reflect this fact of the fluid and changing nature of restorative justice approaches. He explains that project reflects an attempt to do something that might utilize several different ways of accomplishing a particular task whereas the term programme suggests something established or set in place. *Peachey* at 17.

First of all, as we have discussed, any transition towards restorative justice will involve a complex interaction with existing processes, institutions and roles. At the level of detail, the range of institutional practices to be rethought is formidable—in the criminal context, the entry point for restoration can arguably begin as early as preventative policing, extending through prosecutorial discretion, to sentencing (where, all too often, alternative approaches have been taken as beginning). The challenge of weaving restoration into the various existing justice contexts (criminal, family, commercial etc.) needs to be addressed in a context-by-context basis. In the criminal area, where rights of the accused have been extensively constitutionalized in a manner that assumes important features of the present system, research must be undertaken on how this legacy may affect restorative possibilities, and how Charter issues may have to be re-thought where the co-existence of restorative and conventional approaches is contemplated.

Secondly, any move towards a restorative approach should presuppose a careful examination the issue of cross-cultural understandings of justice. The conceptual framework supposes the possibility of cross-cultural dialogue and understanding about justice, and therefore rejects a cultural relativist or determinist view. But supposing the possibility of such dialogue does not, of course, obviate the need to undertake it. By necessity restoration must respond to the moral intuitions of both wrongdoers and sufferers of wrong, however broadly defined. A restorative approach will clearly not work unless there is a policy development process that at least could begin with a broadly based consultation and dialogue with Canadians in all their diversity, asking hard questions about why, for example, so many of us viscerally reach for punishment as a "solution"—a dialogue where voices of wrongdoers and sufferers of wrongs must be present and in interaction.

Thirdly, there is an important agenda in what might be called normative psychology. Of course there is embedded in the framework itself some such tentative psychology. Without making certain assumptions about what human beings are like, what their needs are in general, one could say virtually nothing about restoration. At the same time, as we have continually emphasized, there is an irreducible empirical, context-specific dimension to determining what does restore, and whom. Unfortunately, while there is extensive literature about "healing" and so forth, the end result to which the analysis is directed may be some form of inner peace or acceptance that is not the same as the restoration of relational equality in society. We have at a minimum to re-assess and re-interpret evidence about "healing" or overcoming of victimization (or guilt and shame in the case of wrongdoers) with an eye to the restorative ideal itself.

Finally, we must not lose sight of the connection between the challenge of restorative justice and distribution of resources more generally in society, equality of opportunity, and to some extent equality of social outcomes. It must be more fully appreciated and documented just how much of the current, and threatened, social safety net is connected to the opportunities for restoration. There is an interconnection between the decision on the one hand to spend more money on prisons and "bootcamps" and to reduce social assistance, publicly funded educational opportunities, and access to crisis shelters. The need for empowerment, not punishment, implicit in the restorative ideal entails a basic challenge to the re-orientation of public policy in many jurisdictions in recent years, including Canadian jurisdictions. By choking off the support mechanisms needed for restoration, its enemies could guarantee failure, all the while saying "I told you so". Thus, the resource implications of restorative justice need to be studied with precision, and identified clearly in any policy initiatives; the notion that a significant reorientation of the social envelope may be needed should be entertained in any such studies.